

I N D E X.

A

ACTION.

1. *Partnership—Dormant Partner.*—In cases of a dormant partnership, while the credit is given to an ostensible partner because no other is known to the creditor, yet the creditor may also sue the secret partner when discovered, and the credit will not be presumed to have been given on the sole responsibility of the ostensible partner.—*Richardson et als. v. Farmer et al.*, 35.
2. *Contract not to sue—Answer.*—A covenant or agreement not to sue upon a claim, cannot be pleaded in bar of the prosecution of an action upon such claim. The remedy of the party is by an action upon the covenant or agreement. An answer setting up an agreement not to sue, presents no defence to an action.—*Bridge et als. v. Tierman*, 439.
3. *Bank—Negligence.*—A bank receiving for collection a check payable at a subsequent date, and presenting the same for payment upon the day named without allowing days of grace, is liable to an action by the owner of the check for its negligence in making demand.—*Ivory v. Bank of the State of Mo.*, 475.
4. *Damages—Negligence.*—The same rigid rule in determining what will be a bar to an action on the ground of contributory negligence will not be applied to an infant, an idiot, or an insane person, as to one who had arrived at an age to possess ordinary judgment and discretion. All that is necessary to give a right of action to the plaintiff for an injury inflicted by the negligence of the defendant, is, that he should have exercised care and prudence equal to his capacity.—*Boland & wife v. Missouri R.R. Co.*, 484.
5. *Deed of Trust—Power.*—A. sued the trustee in a deed of trust, and the holder of the notes thereby secured, alleging in his petition that by the power notice of the sale was to be given by advertisement inserted in newspapers printed in St. Louis and Franklin counties, and that notice was only published in Franklin county; and alleging also, that, by the wrongful, oppressive and fraudulent conduct of the holder of the notes, in combination with the trustee, bidders were deterred from bidding, the property was sacrificed, and brought less than parties were ready and willing to bid for it: *Held*, that as by the petition it appeared that the sale was void both in law and equity, no action at law for damages could be sustained.—*Thornburg v. Jones et al.*, 514.
6. *Constitution—Eminent Domain.*—Where the charter of a railroad corporation gives to the company authority to enter upon lands near the line of the

ACTION—(Continued.)

road, and to take therefrom materials to be used in its construction, and provides for ascertaining the damages at the instance of either party, the common law remedy is superseded by the statute, and the party injured cannot sue the corporation at law. Where either party may be the actor, neither can complain that the other did not begin.—*Lindell's Adm'r v. Han. & St. Jo. R.R. Co.*, 543.

7. *Trespasses*.—The "Act concerning trespasses" (R. C. 1855, p. 1532) contemplates voluntary or wilful trespasses only, which are done without lawful right.—*Id.*
8. *Constitution—Eminent Domain*.—Where the Legislature authorizes property to be taken for public uses, and at the same time provides how the damages for such taking may be assessed at the election of either party, and redress obtained, the common law remedy will be taken to be superseded; but where no such remedy is given at the election of the party complaining of the injury, the common law right of action remains unaltered.—*Soulard v. City of St. Louis*, 546.
9. *Counties*.—Counties are *quasi* corporations, created by the Legislature for purposes of public policy, and are not responsible for the neglect of duties enjoined on them, unless the action is given by statute.—*Reardon v. St. Louis County*, 555.

ADMINISTRATION.

1. *Partnership—Bond*.—The creditor of a partnership under process of administration cannot sue upon the bond of a surviving partner unless he present his demand to the surviving partner to be classified within two years, or have the same allowed against the estate of the deceased partner. Unless the claim be thus presented, the partnership estate will belong to those who do establish their claims, and all others will be cut out from its benefit. (R. C. 1855, p. 125, § 63.)—*State to use of Taylor v. Woods et als.*, 73.
- 2.—*Limitations*.—If the administrator give notice of the grant of letters, all claims not presented within three years will be barred, unless the creditor can bring himself within the exceptions of the statute. The presentation of the claim in the manner provided by the statute will save the limitation. Proof that the civil law was suspended, on account of the war, during a portion of the period, will not extend the time for presenting the claim.—*Richardson, Adm'r, v. Harrison, Adm'r*, 96.
3. *Practice*.—Where an action has been commenced for damages done to real estate, if the plaintiff die pending the suit, it may be revived and conducted by the administrator.—*Clark's Adm'r v. Han. & St. Jo. R.R. Co.*, 202.
4. *Guardian and Ward—Securities*.—The securities of a curator who has committed a breach of his bond by converting the moneys of his ward to his own use, will be held liable upon their undertaking although the curator may have subsequently given an additional bond, and have made settlements carrying down the balance due his ward so as to make the securities upon the new bond also liable. A judgment against the securities in the second bond for the whole balance due at the last settlement of the curator, will not discharge the securities upon the first bond from their liability for any

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- acts done before the second bond was given. There can be but one satisfaction, but the ward may pursue all his remedies until he has been fully paid. *Quere* as to the liability of the securities upon the different bonds to contribution.—State to use *Drury v. Drury et al.*, 281.
5. *Partnership*.—The surviving partner administering upon the effects of the partnership is obliged to account only for such effects and assets as actually come into his hands as surviving partner. Sec. 63, p. 125, R. C. 1855, has no application to the surviving partner, but to the administrator of the deceased partner, in respect to the excess of funds he might receive from the surviving partner upon such settlement.—*Crow et als. v. Weidner*, 412.
6. *Partnership*.—Under the act R. C. 1855, p. 121, &c., the powers of the surviving partner are not changed or restricted, otherwise than that he is required to give security for faithful administration of the assets, and payment of the balance due after paying the partnership debts, &c. He is not required to pay the claims presented *pro rata*, but may pay in full such as he sees fit.—*Id.*
7. *Judgment—Estoppel*.—*Hempstead v. Hempstead's Administrator*, affirmed. Where no action can be sustained against the administrator, none can be maintained against his securities; and a judgment in favor of the administrator is a bar to a suit, upon the same subject matter, against the securities, as they are in privity with him.—State to use, &c., *v. Coste et al.*, 437.
8. *Conveyance*.—Under the act (R. C. 1835, p. 33, §§ 20, 21 & 25) it was not necessary that the deed of the administrator, conveying the land of the decedent under a sale made by order of the probate court, should recite the fact of the report of sale and its approval by the court. The deed reciting the order of sale and sale would be *prima facie* evidence of title, and it rests upon the party controverting the effect of the deed to prove affirmatively that the sale was not approved.—*Knowlton v. Smith*, 507.

AGENCY.

1. *Bill of Exchange—Notice*.—The cashier of a bank, the holder of a bill of exchange, is the agent of the holder, and is competent to give the notice of demand and refusal of payment.—*Bank of the State of Mo. v. Vaughan et al.*, 90.
2. *Attorney—Authority*.—Where several suits were brought by the same plaintiff against different defendants (the defences being the same in each case) and the attorneys of the several parties agreed that all the cases should abide the final decision in one case; *held*, that the agreement was within the authority of the attorneys and was binding upon the parties.—*North Mo. R.R. Co. v. Stephens*, 150.
3. *Master and Servant—Contractor*.—A railroad company is not liable for the injuries occasioned by the trespass or negligence of the servants and laborers employed by the contractor engaged in building the road. The principle of *respondent superior* applies to the contractor who employs the men, but not to the corporation with which the original contract is made. There can be but one responsible master for the same servants, and when that relation ceases the liability ceases also.—*Clark's Adm'x v. Han. & St. Jo. R.R. Co.*, 202.

AGENCY—(Continued.)

4. *Damages—Loss of Life.*—Under the second section of the "Act for the better security of life and property," (R. C. 1855, p. 647,) the representatives of a servant can maintain an action against the master, if the death be occasioned by the negligence, unskilfulness or criminal intent of a fellow-servant. The burden of proof is upon the plaintiff to show negligence in such cases.—*Schultz v. Pacific Railroad*, 13.
5. *Damages—Carriers—Railroads.*—The provision of the act (R. C. 1855, p. 647, § 2) relating to passengers dying from injuries occasioned by defects in the railroad or means of transportation, applies only to those transported or carried as passengers. Where the relation is properly that of master and servant, this particular clause of the act has no application. (See *ante* *Schultz v. Pacific R.R.*, 13.) When the passenger by his own misconduct or negligence contributes to the injury, as by riding in the baggage car, contrary to the rules of the railroad, he cannot recover in case of injury.—R. C. 1855, p. 438, § 54.—*Higgins, Guard'n, v. Han. & St. Jo. R.R. Co.*, 418.
6. *Bankers—Lien.*—Where there is no mutual agreement or previous course of dealing between bankers whereby it is expressly or impliedly understood, that remittances of notes or bills when received or collected are to be placed to the credit of previous accounts, or when no advance is made or credit given upon the faith of the particular bills remitted, or of the usual course of dealing, the owner of the bill or note remitted for collection, through his banker, may sue for and recover the amount of said bill or note, although the collecting banker may have carried such amount to the credit of his correspondent in payment of a subsisting indebtedness.—*Millikin et al. v. Shapleigh et al.*, 596.

ATTACHMENT.

1. *Garnishee.*—The garnishee stands in the relation of debtor to the defendant in the attachment suit, and any defence that he can set up against such defendant, he may also use in resisting the claim of the attaching creditor.—*Firebaugh et al. v. Stone, Garn.*, 111.
2. *Garnishee—Execution.*—The defendant in the execution stands to the garnishee in the relation of creditor to debtor; and the plaintiff in the execution, in order to recover, must prove the indebtedness in the same manner as the defendant would be compelled to do had he sued the garnishee.—*Karnes v. Pritchard, Garn.*, 135.
3. *Justices' Courts—Garnishee.*—The garnishee in an execution from a justice of the peace answering, "that he was indebted to the defendant, but could not then state the amount due, as he had a set-off," was allowed time to file an additional answer; held, that allowing time was within the discretion of the justice.—*Id.*
4. *Demand not due.*—An attachment cannot issue, upon a demand not due, for any of the causes specified in the subdivisions 1, 2, 3 & 4 of § 1, R. C. 1855, p. 238.—*Kinear v. Shands*, 379.
5. *Landlord and Tenant.*—The removal by a tenant of a small portion of his furniture for temporary use elsewhere, the tenant not intending to leave the premises, will not authorize the landlord to sue out an attachment against

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the tenant under the act of "Landlords and Tenants." (R. C. 1855, p. 1015, § 28.)—*Id.*

6. *Garnishee*.—The pendency of a suit against the garnishee by the defendant in the attachment or execution will not relieve the garnishee from his liability under the garnishment. After being summoned as garnishee he cannot pay the money due to the attachment or judgment debtor.—*Lieber v. St. Louis Agr. & Mech. Ass'n, Garn.*, 382.

ATTORNEY.

1. *Authority*.—Where several suits were brought by the same plaintiff against different defendants—the defences being the same in each case—and the attorneys of the several parties agreed that all the cases should abide the final decision in one case; *held*, that the agreement was within the authority of the attorneys, and was binding upon the parties.—*North Mo. R.R. Co. v. Stephens*, 150.
2. *Note—Assignment*.—An attorney who receives a note for collection after its maturity, has no power to sell and assign the note.—*Goodfellow v. Landis*, 168.
3. *Constitution*.—The provisions of the new Constitution, Art. II., §§ 6, 9 & 3, which prohibit attorneys and counsellors-at-law from practising in the courts of this State until they have taken and filed the "oath of loyalty," so called, are not in conflict with the Constitution of the United States; they do not impair the obligations of a contract, nor are they in the nature of an *ex post facto* law, nor an attainder.—*State v. Garesché*, 256.

ATTORNEY GENERAL.

1. *Salary*.—The act of the General Assembly of February 13, 1865, (Sess. Acts 1865, p. 124,) increasing the salary of the Attorney General, took effect from its passage and was entirely prospective in its operation. It did not retrospectively increase the salary from the commencement of the quarter of that year.—*State ex rel. Attorney General v. State Auditor*, 66.

B

BAILMENT.

1. *Damages—Carriers—Railroads*.—The provision of the act (R. C. 1855, p. 647, § 2) relating to passengers dying from injuries occasioned by defects in the railroad or means of transportation, applies only to those transported or carried as passengers. Where the relation is properly that of master and servant, this particular clause of the act has no application. (See *ante* *Schultz v. Pacific R.R.*, 13.) When the passenger by his own misconduct or negligence contributes to the injury, as by riding in the baggage car, contrary to the rules of the railroad, he cannot recover in case of injury. (R. C. 1855, p. 438, § 54.)—*Higgins, Guard., v. Han. & St. Jo. R.R. Co.*, 418.
2. *Bank—Negligence—Action*.—A bank receiving for collection a check payable at a subsequent date, and presenting the same for payment upon the day named without allowing days of grace, is liable to an action by the owner of the check for its negligence in making demand.—*Ivory v. Bank of the State of Mo.*, 475.

BAILMENT—(Continued.)

3. *Contract—Consignee—Lien.*—A. at St. Louis made an arrangement with B. at New Orleans mutually to consign produce to each other for sale, B. being authorized to draw bills of exchange for three-fourths of the value of the shipments made by him, the proceeds of sales to be carried to general account. In the course of business, there was a balance of ten thousand dollars in favor of A. upon general account. B. subsequently made a shipment to A. and drew his bill of exchange predicated upon such shipment, and transferred the bill to C., a banker, showing him the letter of credit, the invoice and bill of lading for the goods shipped. C. advanced to B. part of the amount for which the bill was drawn. *In transitu*, the goods shipped were attached by a creditor of B. A. received the bill of lading and invoice two days before the goods were attached. After the attachment the bill of exchange was presented to A. at St. Louis for acceptance, which was refused. A. subsequently replevied the goods in the hands of the sheriff, and after suit commenced paid C. the amount advanced by him and received the protested bill. *Held*, that A. had such a lien upon the goods that he was entitled to maintain his action, and that his title was better than that of the attaching creditor.—*Vallé et al. v. Cerré's Adm'r*, 575.
4. *Factor—Lien.*—Where, by the terms of the agreement between the factor and his consignor, the proceeds of the sale of goods consigned are to be remitted to the consignor, the factor has no property in the goods consigned by the bill of lading, as against an attaching creditor of the consignor, until the goods come into his actual possession. This case distinguished from that of *Vallé et al. v. Cerré's Adm'r*, *ante* p. 575.—*Bruce v. Andrews*, 593.

BILLS AND NOTES.

1. *Practice—Variance.*—A bill was made payable at "the Bk. of Mo. at St. Louis"; the petition alleged presentment of the bill "at the Bank of the State of Missouri at St. Louis, Mo., the place designated in said bill for payment." *Held*, no variance.—*Bk. of the State of Mo. v. Vaughan et al.*, 90.
2. *Notice.*—A bill payable at St. Louis was protested for non-payment, and the notary enclosed the notices to the drawer and endorsers to the last endorser at Springfield, Mo., which was the proper post-office address; he deposited the notices, on the day of their receipt, in the post-office at Springfield. There being no evidence that the prior endorsers and drawer resided in the town of Springfield, *held*, that the notices were properly served.—*Id.*
3. *Notice—Agent.*—The cashier of a bank, the holder of a bill of exchange, is the agent of the holder, and is competent to give the notice of demand and refusal of payment.—*Id.*
4. *Stamp—Evidence.*—Under the act of Congress of March 3, 1863, a note executed before June 1, 1863, is admissible in evidence if the proper stamp be affixed before it is thus offered.—*Day v. Baker et al.*, 125.
5. *Protest—Endorsers—Evidence.*—To secure the liability of the endorsers of a bill of exchange, or negotiable promissory note, demand of payment must be made of all the makers, and notice of demand and refusal must be given to the endorsers. A notary's protest, which stated "that he presented the same at the office of the makers and was refused payment," without stating from whom payment was demanded, does not show a proper

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- demand and refusal of payment. In a suit against endorsers, such protest may be properly excluded as evidence. A demand of payment may be made by the holder of the note or bill, or any agent for him.—*Nave v. Richardson et als.*, 130.
6. *Attorney—Assignment.*—An attorney who receives a note for collection after its maturity, has no power to sell and assign the note.—*Goodfellow v. Landis*, 168.
 7. *Endorsement.*—An endorsement in blank of a promissory note by the holder to a third party, is evidence of an assignment for value, only when the note is taken in the ordinary course of trade.—*Id.*
 8. *Endorser.*—To render the endorser of a negotiable promissory note endorsed after maturity liable as endorser to the holder, payment must be demanded of the maker, and notice of such demand and refusal of payment must be given to the endorser.—*Armstrong v. Armstrong*, 225.
 9. *Grace.*—A check drawn upon a bank, requesting it to pay money, at a day subsequent to its date, to a third party, or order, is entitled to grace; and a presentment on the day named is not a good presentment so as to bind an endorser upon demand and refusal of payment and notice.—*Ivory v. Bank of the State of Mo.*, 475.
 10. *Bank—Negligence—Action.*—A bank receiving for collection a check payable at a subsequent date, and presenting the same for payment upon the day named without allowing days of grace, is liable to an action by the owner of the check for its negligence in making demand.—*Ivory v. Bank of the State of Mo.*, 475.
 11. *Practice.*—The holder of a note who has purchased the same for value may, under our statute, maintain an action in his own name without an endorsement.—*Harvey et al. v. Brooke*, 493.
 12. *Bonds—Assignment.*—The maker of a note payable in property cannot, as against an assignee in good faith, before maturity, for value, set up a defence he may have had against the payee, if the note be written "for value received, negotiable and payable without defalcation." (R. C. 1855, p. 322, § 3.)—*Smith et al. v. Giegrich*, 369.
 13. *Protest—Evidence.*—The official protest of a notary is the proper legal evidence of the presentment, demand and refusal of payment of a foreign bill of exchange, and such protest cannot be dispensed with as in cases of inland bills.—*Com. Bank of Ky. v. Barksdale et als.*, 563.
 14. *Protest—Notary Public.*—The presentment and demand of payment of a foreign bill of exchange must be made by the same notary who protests the bill; it cannot be done by his clerk, nor by any other person as his agent, although he be also a notary. Notaries are public officers, and as such cannot act as partners. A protest made by one notary, when another notary made the demand of payment, is not a legal protest. The protest, or the noting of the bill for protest, must be made upon the same day the presentment is made.—*Id.*
 15. *Conflict of Laws—Lex Loci.*—A foreign bill of exchange must be presented for payment upon the day on which it is payable by the law of the place of payment.—*Id.*

BILLS AND NOTES—(Continued.)

16. *Excuse of Notice*.—The drawer of a bill of exchange who, by his course of dealing with his correspondent, has reasonable cause for believing that his drafts will be duly honored, is entitled to notice of protest.—*Id.*
17. *Acceptance*.—A written contract to accept a non-existing bill of exchange, must point to the particular bill and describe it in express terms (R. C. 1855, p. 293, § 3). A general letter of credit is not an acceptance of a particular bill; but a party taking a bill upon the faith of such letter can maintain an action against the promissor to recover the amount advanced.—Vallé et al. v. Cerré's Adm'r, 575.
18. *Contract—Letter of Credit*.—A. at St. Louis gave to B. at New Orleans a letter of credit, authorizing B. to draw bills of exchange predicated upon actual shipments made to A. to the amount of three-fourths of the value of such shipments. *Held*, that such letter was a general authority, and was to be construed most strongly against the giver of the power; and that a banker, taking a bill thus drawn, could not be required to look beyond the letter of credit, the invoice, and bill of lading, to determine whether B. had exceeded his power by drawing for a larger amount than he was authorized.—*Id.*

BOATS AND VESSELS.

1. *Limitations*.—Suits, under the act R. C. 1855, p. 313, § 42, against boats and vessels upon running accounts for supplies, &c., must be brought within six months after date of the last item in the account.—Madison County Coal Co., v. St. bt. Colona, 446.
2. *Lien*.—A party has a lien upon a boat for labor done and services rendered in getting out a boat and placing her in a position to begin her voyage, and in such cases there is none the less a lien because part of the service consisted in towing the boat.—*Id.*

BONDS AND NOTES ASSIGNABLE.

See ADMINISTRATION, 1, 4.

1. *Assignment*.—The maker of a note payable in property cannot, as against an assignee in good faith, before maturity, for value, set up a defence he may have had against the payee, if the note be written "for value received, negotiable and payable without defalcation." (R. C. 1855, p. 322, § 3).—Smith et al. v. Giegrich, 369.

C

CITY OF HANNIBAL.

See COURTS, 2.

CITY OF ST. LOUIS.

See REVENUE, 5, 6, 7, 8, 9, 10.

CONFLICT OF LAWS.

1. *Foreign Judgment—Limitations*.—Where the statute of limitations of the State in which a judgment is recovered operates to extinguish the contract or debt itself, the case no longer falls within the law of limitation of the remedy; and when such judgment is sued upon in another State, the *lex*

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loci contractus, and not the *lex fori*, is to govern.—*Baker v. Stonebraker's Admr's*, 338.

2. *Bills of Exchange—Lex Loci*.—A foreign bill of exchange must be presented for payment upon the day on which it is payable by the law of the place of payment.—*Com. Bank of Ky. v. Barksdale et als.*, 563.

CONSTITUTION.

1. *Governor—Executive Power—Process*.—The Governor, representing the sovereign executive power in the State, is always virtually present in his courts for the purpose of executing the mandates and process of the courts, whenever the power of the marshal and an ordinary *posse* may not be sufficient for the purpose, or when the peace and dignity of the State may so require.—*Thomas v. Mead et al.*, 232.
2. *Supreme Court*.—It belongs peculiarly to the Supreme Court to put a final construction upon the Constitution and statute laws of the State.—*Id.*
3. *Attorneys*.—The provisions of the new Constitution, Art. II., §§ 6, 9 & 3, which prohibit attorneys and counsellors-at-law from practising in the courts of this State until they have taken and filed the "oath of loyalty," so called, are not in conflict with the Constitution of the United States; they do not impair the obligations of a contract, nor are they in the nature of an *ex post facto* law, nor an attainder.—*State v. Garesché*, 256.
4. *State—Church*.—The State has the power to regulate, control or prohibit any trade, business, or profession, within the limits of its jurisdiction. The provisions of the new Constitution, Article II., sections 6, 9, 14 and 3, do not conflict with the provisions of the Constitution of the United States. Such provisions are not in the nature of an *ex post facto* law, nor of a bill of attainder. A bill of pains and penalties is a law in the nature of a judicial act declaring a person's estate confiscated, or forfeiting some right, without giving him the right to be heard before a judicial tribunal, and by its own force inflicts the penalty. The provisions of Art. II. merely prescribe certain prerequisites for the doing of certain acts, and inflicts a penalty only for failing to comply with the conditions prescribed.—*State v. Cummings*, 263.
5. *Ex post facto Law*.—The provisions of Art. II., §§ 6, 9, 14 & 3, are not in the nature of an *ex post facto* law, for they do not impose any penalty for any act previously done; but punish the doing of some future act unless certain terms are complied with, which is violating an existing law.—*Id.*
6. *Declaration of Rights*.—The provisions of Art. II., §§ 3, 6, 9 & 14, of the new Constitution do not conflict with the provisions of Art. I.—*Id.*
7. *Election—Office*.—By the Constitution, Art. II., § 8, no vote can be counted for, nor any certificate of election granted to, any candidate who has not taken and filed the oath of loyalty within fifteen days next preceding the election. A certificate of election granted to one who has not thus taken and filed the oath is null and void.—*State ex inf. Att'y Gen. v. McAdoo*, 452.
8. *Office—Appointing Power*.—Under the Constitution, the Governor has not the power to fill by appointment a vacancy in the office of sheriff occurring

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after the Constitution went into effect. Such vacancy must be filled in the manner provided in Art. IV., §§ 23 & 24.—*State ex inf. Attorney Gen. v. McAdoo*, 458.

9. *Evidence*.—It is competent for the Legislature to change the rules of evidence, and prescribe what shall be the effect of evidence in future suits, as well as to change the remedy.—*City of St. Louis to use, &c., v. Oeters*, 456.
10. *Special Tax*.—Cases of *Egyptian Levee Co. v. Hardin* (27 Mo. 495), and *City of St. Joseph v. Anthony* (30 Mo. 539), affirmed.—*City of St. Louis, to use McGrath et al. v. Clemens*, 467.
11. *Eminent Domain—Action*.—Where the charter of a railroad corporation gives to the company authority to enter upon lands near the line of the road and to take therefrom materials to be used in its construction, and provides for ascertaining the damages at the instance of either party, the common law remedy is superseded by the statute, and the party injured cannot sue the corporation at law. Where either party may be the actor, neither can complain that the other did not begin.—*Lindell's Adm'r v. Han. & St. Jo. R.R. Co.*, 543.
12. *Action—Eminent Domain*.—Where the Legislature authorizes property to be taken for public uses, and at the same time provides how the damages for such taking may be assessed at the election of either party, and redress obtained, the common law remedy will be taken to be superseded; but where no such remedy is given at the election of the party complaining of the injury, the common law right of action remains unaltered. (See *Lindell's Adm'r v. Han. & St. Jo. R.R. Co.*, *ante* p. 543.)—*Soulard v. City of St. Louis*, 547.
13. *Eminent Domain—Corporations, Municipal and Private*.—There is a well recognized distinction as to liability between the acts of a municipal corporation in the discharge of such legislative functions as have been delegated to it by the State, and those acts done by a mere private corporation in the prosecution of enterprises for its own advantage or benefit. In the former case, no action can be maintained holding it responsible, where it is pursuing in a legal manner the power thus delegated to it.—*Soulard v. City of St. Louis*, 546.
14. *Officers—Quo warranto*.—Under the new Constitution, officers failing to take and file the oath prescribed, forfeit their offices, and upon a proper information judgment of ouster will be entered.—*State ex inf. Circuit Attorney v. Bernoudy*, 279.

CONTRACT.

See AGENCY, 6. BAILMENTS, 2, 3, 4. BILLS AND NOTES, 18. PARTNERSHIP. SALES.

1. *Sale—Delivery*.—In a contract for the sale of goods to be delivered at a future day, where the place of delivery is not fixed by the terms of the contract, it is the duty of the seller to tender the goods at the residence or place of business of the purchaser; or if the goods be inconvenient to transport, he must seek the vendee a reasonable time before the day of delivery, and ask him to appoint the place of delivery.—*Stillwell v. Bowling*, 310.

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2. *Sale—Estoppel.*—A party claiming to be the owner of goods by purchase and delivery, is estopped by the levy of an execution in his favor upon the same goods as the property of the defendant in the execution.—*Langsdorf et al. v. Field et als.*, 440.
3. *Sale.*—Possession of personal property is presumptive evidence of title; but where a sale is made and possession delivered to the purchaser, yet if by express agreement the title is to remain in the seller until the price be paid, the right of property is not vested in the purchaser until payment. And where the vendor has been guilty of no laches, he may reclaim the goods from a third party who took them in good faith and without notice.—*Parmlee v. Catherwood et al.*, 479.
4. *Statute of Frauds—Writing.*—A memorandum or note in writing, to take a case out of the statute of frauds, signed by the party to be charged, need not express the consideration, and need not be signed by the party seeking to enforce the contract. Where a bill is filed to enforce the specific performance of a contract in writing signed by the defendant, the contract is also signed by the plaintiff.—*Ivory v. Murphy*, 534.

CONVEYANCES.

1. *Power of Attorney.*—A. gave to B. a power of attorney to transact all his business, to collect all moneys due him, and to sell all his property real and personal; B., under the power, conveyed by deed of trust to C., as trustee, all the property and assets of A. in trust to secure and pay off the creditors and sureties of A. *Held*, that the power was properly executed, and that C. took a good title to the property.—*Lamy et al. v. Burr, Garn.*, 85.
2. *Execution—Sheriff's Deed.*—The deed made by the sheriff, upon a sale of land under execution, must show that the sheriff acted under a writ that was in force at the time he made the sale. When the sheriff endorsed upon an execution issued June 12, 1854, and returnable the first Monday of August, 1854, a levy made June 16, 1854, and then under the same writ made a sale on the 29th November, 1854; *held*, that no title passed by the deed. The endorsement of a levy upon the writ will not continue the execution in force, so that a sale can be made without a *venditioni exponas*. (*R. C.* 1855, p. 748, § 54.)—*Lackey v. Lubke*, 115.
3. *Uses and Trusts—Trustees.*—In consideration of the payment of the sum of \$500, M. conveyed land to nine persons as trustees of the Methodist Episcopal Church South, and to them and their successors in office lawfully appointed forever; one of the grantees died, and another removed from the State; *held*, that the Circuit Court had no authority to fill the vacancies and appoint new trustees under the act. (*R. C.* 1855, p. 1554, § 1.) *Held*, further, that if the consideration was paid by the persons constituting the church, that a court of equity would, upon the application of the church, fill the vacancies existing by appointing as trustees such persons as the church might select; but if the money was paid by the grantees, that then the legal title would belong to them and no appointment was needed.—*Draper et al. v. Minor et al.*, 290.
4. *Mortgage—Mistake.*—A conveyance intended as a security for a debt will not be treated as a mortgage in a court of law, unless the land be conveyed

CONVEYANCES—(Continued)

- to the creditor upon condition. A deed between A. and B. by which A. upon a consideration received from B. conveys to A. (himself) real estate, to be void upon payment of a debt due by A. to B., cannot be foreclosed as a mortgage in a court of law, although in a court of equity, upon proper allegations of mistake, the deed might be reformed and the equity of redemption foreclosed.—*Rackliffe v. Seal et al.*, 317.
5. *Mortgage—Deed of Trust—Title.*—After the maturity of the debt secured by a mortgage or deed of trust of personal property, the mortgagee or trustee has the legal title and the right to recover possession. Although the trustee may have advertised and sold the property, he may sue for the possession, so that he may deliver the property sold to the purchaser.—*Lacey, Trustee, v. Giboney*, 320.
6. *Notice.*—A lease, to give notice of its terms to third parties, must be recorded.—*Carr v. Carr et al.*, 498.
7. *Administration.*—Under the act (R. C. 1835, 'p. 33, §§ 20, 21 & 25) it was not necessary that the deed of the administrator, conveying the land of the decedent under a sale made by order of the probate court, should recite the fact of the report of sale and its approval by the court. The deed reciting the order of sale and sale would be *prima facie* evidence of title, and it rests upon the party controverting the effect of the deed to prove affirmatively that the sale was not approved.—*Knowlton v. Smith*, 507.
8. *Estoppel—Agreement.*—Parties agreeing upon a division line between their respective lands, are not estopped by such agreement if it be entered into under a mistake of facts, provided the rights of innocent third parties have not intervened in consequence thereof.—*Id.*

CORPORATIONS, MUNICIPAL.

See REVENUE, 5, 6, 7, 8, 9, 10.

1. *Counties.*—Corporations must act strictly within the limits of the powers conferred upon them by the act creating them. A county is a political division of the State, and a *quasi* corporation—performing in part the duties of the State, as an auxiliary of the government and a trustee for the people. An act of the Legislature investing the county court with power to do certain acts, necessarily implies the right to use the fit and appropriate means. Where, by an order of record, the county court ordered that a subscription be made for the stock of a railroad in accordance with an authority conferred by the charter of the company, a subsequent order of the court appointing an agent to enter the subscription upon the books of the company was a proper method for completing the subscription; the agent was a mere instrument executing an order. A subsequent ratification of the subscription by the court, under an act authorizing the same, would make the contract binding although it had been originally void.—*Han. & St. Jo. R.R. Co. v. Marion Co.*, 294.
2. *Estoppel.*—Where a county, acting under an authority it supposed to be valid, subscribed to the stock of a railroad company in good faith—issued its coupon notes in payment of such subscription—for a series of years voted such stock and paid its coupons—and such notes passed into the hands of innocent and *bona fide* purchasers,—it is estopped from asserting that such notes were illegally issued.—*Id.*

CORPORATIONS, MUNICIPAL—(*Continued.*)

3. *Damages—Action.*—A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done at its command, by its agents, in relation to a matter within the scope of the purpose for which it was incorporated. Where a municipal corporation opened a street through the lands of an individual without first having the land condemned and damages assessed in the manner provided by its charter, in an action against such corporation for the damages sustained the value of the land taken will be the measure of damages, and a judgment for such damages will work a dedication of the land to the corporation.—*Soulard v. City of St. Louis*, 546.
4. *Eminent Domain.*—There is a well recognized distinction as to liability between the acts of a municipal corporation in the discharge of such legislative functions as have been delegated to it by the State, and those acts done by a mere private corporation in the prosecution of enterprises for its own advantage or benefit. In the former case, no action can be maintained holding it responsible, where it is pursuing in a legal manner the power thus delegated to it.—*Soulard v. City of St. Louis*, 546.
5. *Counties.*—Counties are *quasi* corporations, created by the Legislature for purposes of public policy, and are not responsible for the neglect of duties enjoined on them, unless the action is given by statute.—*Reardon v. St. Louis County*, 555.

CORPORATIONS, RAILROAD.

1. *Damages—Loss of Life.*—Under the second section of the "Act for the better security of life and property," (R. C. 1855, p. 647,) the representatives of a servant can maintain an action against the master, if the death be occasioned by the negligence, unskilfulness, or criminal intent, of a fellow-servant. The burden of proof is upon the plaintiff to show negligence in such cases.—*Shultz v. Pacific Railroad*, 13.
2. *Trespasses—Enclosures.*—Railroad corporations are not required to fence in their tracks so as to prevent cattle from straying upon the adjoining fields. If they fail to fence their tracks and put up proper cattle-guards, they become liable to the owners of such stock as may be injured while straying upon the track, without any proof of negligence. (R. C. 1855, p. 437, § 52, and p. 647, § 5.) The object of the statute was the protection of the railroad, the safety of passengers and trains, and the prevention of accidents and injuries to cattle or other animals straying on the track.—*Clark's Adm'x v. Han. & St. Jo. R.R. Co.*, 202.
3. *Trespasses—Damages.*—Where a railroad corporation has had the right of way condemned and the damages assessed under the statute, they have power to construct their road through the land thus condemned, and to do all things that may be necessary and proper for that purpose; and, to the extent of the powers and rights thus acquired, neither the corporation nor the contractors can be held liable as trespassers or wrong-doers.—*Id.*
4. *Trespasses—Nuisance.*—In the absence of any negligence, unskilfulness or mismanagement in the construction of an embankment for the bed of a

CORPORATIONS, RAILROAD—(*Continued.*)

railroad over land through which there was no natural channel for the passage of water, the injury done by such embankment in causing the water to overflow the land of the adjoining proprietors must be considered as the natural consequence of what the corporation had acquired the lawful right to do by a condemnation of the land and the assessment of damages therefor, and such damages must be taken to have been included in the compensation assessed.—*Id.*

5. *Damages—Negligence.*—Negligence is the want of that care which men of common sense and common prudence ordinarily exercise in like employments. Railroad companies, owing to the dangerous character of the machinery and vehicles which they operate, will be held to the greatest caution and skill in the management of their business; but this will not exonerate others who are wanting in prudence or guilty of negligence.—*Kennedy v. North Mo. R.R. Co.*, 351.
6. *Damages—Carriers.*—The provision of the act (R. C. 1855, p. 647, § 2) relating to passengers dying from injuries occasioned by defects in the railroad or means of transportation, applies only to those transported or carried as passengers. Where the relation is properly that of master and servant, this particular clause of the act has no application. When the passenger by his own misconduct or negligence contributes to the injury, as by riding in the baggage car, contrary to the rules of the railroad, he cannot recover in case of injury. (R. C. 1855, p. 438, § 54.)—*Higgins, Guard., v. Han. & St. Jo. R.R. Co.*, 418.

COURTS.

1. *Jurisdiction.*—The Circuit Court has concurrent jurisdiction with justices of the peace in actions on contracts, only in cases where the amount exceeds fifty and is less than ninety dollars. (R. C. 1855, p. 533, § 8.)—*Murphy et al. v. Campbell*, 110.
2. *Practice—Recorder of Hannibal.*—By the act of 1851, p. 335, Art. VIII., in suits brought before the recorder of the city of Hannibal for the recovery of the possession of personal property, the practice must conform to that prescribed in suits brought in the Circuit Courts, and the case must be tried upon written pleadings.—*Summons v. Austin*, 307.
3. *St. Charles Probate Court—Appeal.*—Under the provisions of the act establishing the St. Charles Probate Court, (Sess. Acts 1859-60, p. 13, § 3,) an appeal lies from that court to the Supreme Court.—*Crow et als. v. Weidner*, 412.
4. *Jurisdiction—Justices' Courts—Law Commissioner.*—Justices of the peace and the Law Commissioner's Court for St. Louis county have no jurisdiction to enforce a lien upon real estate to secure the payment of a special tax for the improvement of streets and alleys, under the charters and ordinances of the City of St. Louis.—*City of St. Louis to use, &c., v. Rudolph*, 465.

COUNTIES.

See CORPORATIONS, MUNICIPAL, 1, 9. COURTS, 1, 3, 4.

CRIMES.

1. *Robbery—Larceny—Criminal Practice.*—A party indicted for the crime of robbery in the first degree (R. C. 1855, p. 574, § 20) cannot be convicted of robbery in the second degree (R. C. 1855, p. 594, § 21), but may be convicted of larceny. It is of the essence of robbery in the first degree, that the violence or fear of injury should be present and immediate to the person, and that the property should be actually taken from the owner's person, or in his presence, and against his will.—*State v. Jenkins*, 372.
2. *Slavery—Larceny.*—The possession of the slave is the possession of the master. An indictment, therefore, charging the defendant with purchasing from a slave, property belonging to the master, is bad on motion in arrest.—*State v. Edwards*, 394.

D

DAMAGES.

1. *Loss of Life.*—Under the second section of the "Act for the better security of life and property," (R. C. 1855, p. 647,) the representatives of a servant can maintain an action against the master, if the death be occasioned by the negligence, unskilfulness or criminal intent of a fellow-servant. The burden of proof is upon the plaintiff to show negligence in such cases.—*Schultz v. Pacific Railroad*, 13.
2. *Railroads—Trespasses.*—Where a railroad corporation has had the right of way condemned and the damages assessed under the statute, they have power to construct their road through the land thus condemned, and to do all things that may be necessary and proper for that purpose; and, to the extent of the powers and rights thus acquired, neither the corporation nor the contractors can be held liable as trespassers or wrong-doers.—*Clark's Adm'r v. Han. & St. Jo. R.R. Co.*, 202.
3. *Railroads—Negligence.*—Negligence is the want of that care which men of common sense and common prudence ordinarily exercise in like employments. Railroad companies, owing to the dangerous character of the machinery and vehicles which they operate, will be held to the greatest caution and skill in the management of their business; but this will not exonerate others who are wanting in prudence or guilty of negligence.—*Kennedy v. North Mo. R.R. Co.*, 351.
4. *Carriers—Railroads.*—The provision of the act (R. C. 1855, p. 647, § 2) relating to passengers dying from injuries occasioned by defects in the railroad or means of transportation, applies only to those transported or carried as passengers. Where the relation is properly that of master and servant, this particular clause of the act has no application. (See *ante* *Schultz v. Pacific R.R.*, 13.) When the passenger by his own misconduct or negligence contributes to the injury, as by riding in the baggage car, contrary to the rules of the railroad, he cannot recover in case of injury. (R. C. 1855, p. 438, § 54.)—*Higgins, Guard., v. Han. & St. Jo. R.R. Co.*, 418.
5. *Limitations.*—Suits for damages under the 2d section of the "Act for the better security of life," &c. (R. C. 1855, p. 647), must be commenced within one year after the cause of action accrues. If the wife of the deceased fail to sue within six months, the minor child has not twelve months thereafter within which to sue.—*Kennedy v. Burrier*, 128.

DAMAGES—(*Continued.*)

6. *Trespass*.—"Exemplary damages" would seem to mean, in the ordinary and proper sense of the words, such damages as would be a good round compensation, and an adequate recompense for the injury sustained, and such as might serve for a wholesome example to others in like cases. Where the defendants, forming part of a body of armed men, forcibly broke and entered the plaintiff's store, putting him in bodily fear, and took and carried away a large portion of the plaintiff's stock of goods, injuring his business, the mere value of the goods taken with interest thereon is not the proper measure of damages.—*Freidenheit v. Edmundson et als.*, 226.
7. *Action—Negligence*.—Where the defendant has used proper care and caution to prevent an accident, and has been guilty of no negligence, he will not be responsible for an injury caused by such accident.—*Boland and wife v. Missouri R.R. Co.*, 484.
8. *Exemplary Damages*.—To authorize the giving of exemplary damages, malice, violence, oppression, or wanton recklessness, must be proven.—*Kennedy v. North Mo. R.R. Co.*, 351.
9. *Corporations—Action*.—A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done at its command, by its agents, in relation to a matter within the scope of the purpose for which it was incorporated. Where a municipal corporation opened a street through the lands of an individual without first having the land condemned and damages assessed in the manner provided by its charter, in an action against such corporation for the damages sustained the value of the land taken will be the measure of damages, and a judgment for such damages will work a dedication of the land to the corporation.—*Soulard v. City of St. Louis*, 546.

DEPOSITIONS.

1. *Practice*.—Where the deposition of a witness, residing more than forty miles from the place of trial, was taken, it may be read in evidence, although the witness may have attended at the court, if he depart before the trial without the consent or collusion of the party offering the deposition.—*Huthsing v. Maus*, 101.
2. *Witness—Contradiction—Evidence*.—Where an attempt is made to impeach a witness by showing that he has made statements differing from his testimony, the witness must have his attention called to the time, place and circumstances of the statements made and the person to whom made, that he may have the opportunity to explain the contradiction. If the attempt be made to impeach his testimony by statements made after the taking of his deposition, a new commission must be taken out, and he must be interrogated as to his contradictory statements before his testimony can be impeached.—*Gregory v. Cheatham et al.*, 155.
3. *Notice*.—If a party appear at the taking of the deposition and cross-examine the witness, he cannot afterward object to the sufficiency of the notice.—*Goodfellow v. Landis*, 168.

E

EJECTMENT.

See LANDS AND LAND TITLES.

1. *Confirmation—Title*.—A plaintiff in ejectment who shows no title in himself

EJECTMENT—(Continued.)

cannot be permitted to controvert the *prima facie* title of the defendant under a confirmation and official survey by the United States.—Robbins et als. v. Eckler et als., 494.

2. *Execution—Sheriff's Deed.*—The deed made by the sheriff, upon a sale of land under execution, must show that the sheriff acted under a writ that was in force at the time he made the sale. When the sheriff endorsed upon an execution issued June 12, 1854, and returnable the first Monday of August, 1854, a levy made June 16, 1854, and then under the same writ made a sale on the 29th November, 1854; *held*, that no title passed by the deed. The endorsement of a levy upon the writ will not continue the execution in force, so that a sale can be made without a *venditioni exponas*. (R. C. 1855, p. 748, § 54.)—Lackey v. Lubke, 115.
3. *Conveyance.*—Under the act (R. C. 1835, p. 33, §§ 20, 21 & 25) it was not necessary that the deed of the administrator, conveying the land of the decedent under a sale made by order of the probate court, should recite the fact of the report of sale and its approval by the court. The deed reciting the order of sale and sale would be *prima facie* evidence of title, and it rests upon the party controverting the effect of the deed to prove affirmatively that the sale was not approved.—Knowlton v. Smith, 507.
4. *Estoppel—Conveyance—Agreement.*—Parties agreeing upon a division line between their respective lands, are not estopped by such agreement if it be entered into under a mistake of facts, provided the rights of innocent third parties have not intervened in consequence thereof.—*Id.*
5. *New Madrid Location.*—A defendant claiming title under a New Madrid location is in a position to dispute the correctness and validity of a *prima facie* superior title of the plaintiff under a confirmation by the act of June 13, 1812.—Clark v. Hammerle, 620.

EQUITY.

1. *Practice—Judgment—Injunction.*—A defendant in a suit who has been properly served with process, and has failed to appear, cannot enjoin the judgment entered against him, unless he show not only that it is inequitable to execute such judgment against him, but also that he could not have availed himself of his defence at law, or that he was prevented by fraud or accident, without any fault or negligence on his part.—George v. Tutt et als., 141.
2. *Vendors and Purchasers—Estoppel.*—An outstanding title purchased by a vendee of land in possession under a title bond, enures to the benefit of the vendor. In a suit upon the notes given for the consideration, the vendee cannot defeat a recovery upon the ground of failure of title, but will be allowed the cost and expenses of his purchase of such outstanding title.—Ash, Adm'r, v. Holder, 163.
3. *Lands—Pre-emptions.*—The act of Congress concerning pre-emptions gives the officers of the Land Department the right to determine all questions arising between different settlers. The fee of the lands in this State being originally in the Government, and Congress being vested exclusively with the primary disposal of the soil, the presumption is in favor

EQUITY—(*Continued.*)

- of the action of the officers designated to execute the laws made for that purpose. Where the officers are vested with discretionary authority, their acts are not subject to the revision of our courts; but when they act without authority of or in violation of law, then jurisdiction will be assumed. A patent carries the legal title, and the presumption is that all necessary preliminary steps have been taken, and in favor of its validity; and the burden of proof is upon him who impeaches it.—*Hill v. Miller*, 182.
4. *Practice—Pleading—Fraud.*—A petition which seeks to set aside a patent and to hold the patentee as trustee, upon the ground of fraud, must be as definite and precise as was formerly required on a bill in chancery. It is not sufficient to make a general allegation of fraud without any other specifications of the acts which constituted it.—*Id.*
 5. *Conveyance—Mortgage—Mistake.*—A conveyance intended as a security for a debt will not be treated as a mortgage in a court of law, unless the land be conveyed to the creditor upon condition. A deed between A. and B. by which A. upon a consideration received from B. conveys to A. (himself) real estate, to be void upon payment of a debt due by A. to B., cannot be foreclosed as a mortgage in a court of law; although, in a court of equity, upon proper allegations of mistake, the deed might be reformed and the equity of redemption foreclosed.—*Rackliffe v. Seal et al.*, 317.
 6. *Practice—Evidence—Fraud.*—A creditor claiming title to land by virtue of a purchase under his judgment and a sale by the sheriff, and seeking to set aside a prior conveyance of the debtor on the ground of fraud, must show that he has acquired the title by a sheriff's deed, if the title be put in issue by the pleadings.—*Hiney v. Thomas et al.*, 377.
 7. *Mortgagor—Substitution.*—A. executed a deed of trust, in the nature of a mortgage, to secure a debt, and subsequently by deed poll conveyed the property to B., reciting in the conveyance that part of the consideration was the payment of the encumbrance by B.; *held*, that B. could not be considered as a mortgagor, and that a personal judgment against B. for the mortgage debt was erroneous. (*R. C.* 1855, p. 1089, §§ 10, 14.)—*Mason v. Barnard et als.*, 384.
 8. *Uses and Trusts—Purchasers.*—The trustee holds the legal estate for benefit of the *cestui qui trust*, and no act of his can prejudice the beneficiary; but if the trustee be in actual possession of an estate and sell it to an innocent purchaser, for a valuable consideration, without any notice of the trust, the purchaser will be protected.—*Grove v. Heirs of Robards et al.*, 523.
 9. *Fraud—Notice—Conveyances.*—The heirs of the grantor in a deed of trust in the nature of a mortgage, who has by fraudulent representations induced the trustee to release the property without the knowledge and consent of the *cestui qui trust*, take the estate with full notice, and stand in the same position as their ancestor.—*Id.*
 10. *Contract—Statute of Frauds—Writing.*—A memorandum or note in writing, to take a case out of the statute of frauds, signed by the party to be charged, need not express the consideration, and need not be signed by the party seeking to enforce the contract. Where a bill is filed to enforce the specific performance of a contract in writing signed by the defendant, the contract is also signed by the plaintiff.—*Ivory v. Murphy*, 534.

EQUITY—(Continued.)

11. *Contract—Specific Performance.*—The specific performance of a contract for the sale of land, is not granted as a mere matter of right by the court to which it is addressed, but from a just and reasonable discretion, to be governed by sound legal rules and principles.—*Id.*
12. *Securities—Substitution.*—P. & Co., at New Orleans, gave to C., at Saint Louis, letters of credit authorizing him to draw bills of exchange from time to time upon them. As security for these advances to be thus made, C. gave to P. & Co. a deed of trust upon real estate, providing that if any part of the bills accepted by P. & Co., or thereafter to be accepted, should remain unpaid by C. on the 31st December, 1860, that the deed of trust might be foreclosed. This deed was recorded, and C. drew his bills and had them discounted. P. & Co. subsequently released part of the real estate covered by the deed of trust, and this release was also recorded, and the land conveyed as security for other parties. Upon a bill filed by the holders of the bills drawn by C., accepted by P. & Co., and protested for non-payment, P. & Co. having become insolvent, to set aside such release, and to enforce the security in favor of the holder: *Held*, that by its terms the deed of trust was given to secure the balance only of such bills as P. & Co. might have paid for C.; that the bills were discounted upon the faith of the letters of credit, and that the holders thereof had no interest in the property released, more especially as against parties who had innocently acquired rights under the release. *Semble*—That P. & Co., being the acceptors of the bills and the principal debtors, a suit might have been sustained against them by the holders of the bills, to have the security while in their hands assigned for the benefit of the creditors. *Held also*, that the recording of the deed of trust could not impart notice to subsequent creditors of any equitable rights in the holders of the bills, as it was not given for their benefit.—*St. Louis Build. & Sav. Ass'n v. Clark and wife et als.*, 601.

ERROR.

1. *Practice—Irregularity.*—Where the plaintiff in the suit dies, the administrator can be substituted in his place only by the voluntary appearance of the defendant, or by the service upon him of a *scire facias*. To enter the appearance of the administrator and give judgment against defendant without such appearance or *scire facias*, is erroneous.—*Harkness, Adm'r, v. Austin et al.*, 47.
2. *Practice—Irregularity—Limitations.*—The party has three years within which to move to set aside a judgment for irregularity.—*Id.*
3. *Judgment—Irregularity—Appearance.*—*Smith's Adm'r v. Rollins*, 25 Mo. 408, affirmed. A party appearing in court to move to set aside a judgment against him for irregularity, is in court for that purpose only.—*Lincoln v. Hilbus*.—149.
4. *Judgment.*—A judgment at law is an entirety—good as to all, or bad as to all the defendants. A judgment rendered jointly against the maker and endorser of a promissory note, in a suit in which the maker was not served with process, is erroneous as against the endorser, and will be reversed upon writ of error or appeal.—*Covenant Mut. Life Insur. Co. v. Clover et al.*, 392.

ERROR—(*Continued.*)

5. *Practice—Motion for New Trial—Criminal Practice.*—Such errors as appear upon the face of the record, or such as may be taken advantage of by a motion in arrest or by a writ of error, will, in criminal cases, be noticed in the Supreme Court as a matter of course; but as to exceptions taken in the progress of the trial, and as to motions for a new trial and in arrest which become part of the record only by bill of exceptions, the same rule governs in criminal as in civil cases.—*State v. Marshall*, 400.
6. *Practice—New Trial.*—No exception can be taken in the Supreme Court, upon appeal or writ of error, to matters not appearing upon the face of the record, unless they are made part of the record by bill of exceptions and have been expressly decided by the court below, which must appear by the filing and overruling a motion for a new trial, and exceptions thereto preserved. It is not required by the statute (R. C. 1855, p. 1286, § 6) that the motion for a new trial should specify the reasons for which it is made, but that is the better practice. By the Practice Act of 1849 it was not necessary that the exceptions should be saved by a motion for a new trial. (*Fine v. Rogers*, 15 Mo. 315; *Wagner v. Jacoby*, 26 Mo. 530; *Prince v. Cole*, 28 Mo. 486; *Gray v. Heslep*, 33 Mo. 243, commented upon.)—*Id.*

ESTOPPEL.

1. *Corporations—Counties.*—Corporations must act strictly within the limits of the powers conferred upon them by the act creating them. A county is a political division of the State, and a *quasi* corporation—performing in part the duties of the State, as an auxiliary of the government and a trustee for the people. An act of the Legislature investing the county court with power to do certain acts, necessarily implies the right to use the fit and appropriate means. Where, by an order of record, the county court ordered that a subscription be made for the stock of a railroad in accordance with an authority conferred by the charter of the company, a subsequent order of the court appointing an agent to enter the subscription upon the books of the company was a proper method for completing the subscription; the agent was a mere instrument executing an order. A subsequent ratification of the subscription by the court, under an act authorizing the same, would make the contract binding although it had been originally void.—*Han. & St. Jo. R.R. Co. v. Marion County*, 294.
2. *Corporations, Municipal.*—Where a county, acting under an authority it supposed to be valid, subscribed to the stock of a railroad company in good faith—issued its coupon notes in payment of such subscription—for a series of years voted such stock and paid its coupons—and such notes passed into the hands of innocent and *bona fide* purchasers,—it is estopped from asserting that such notes were illegally issued.—*Id.*
3. *Dedication.*—The dedication of land to public uses can be made only by the owner of the fee. The making and recording of a plat of a town, upon which plat certain portions of the land are marked as public, is a grant of such lands to public use, and all persons claiming by subsequent grant through the party thus filing such plat are estopped from denying the title of the public. But a party in possession of such lands, not thus claiming title, is not estopped from denying the title of the party filing the plat.

ESTOPPEL—(*Continued.*)

(See S. C. 15 Mo. 634.)—*City of Hannibal v. Heirs & Adm'r of Draper*, 332.

4. *Judgment.*—*Hempstead v. Hempstead's Administrator*, affirmed. Where no action can be sustained against the administrator, none can be maintained against his securities; and a judgment in favor of the administrator is a bar to a suit, upon the same subject matter, against the securities, as they are in privity with him.—*State to use, &c., v. Coste et al.*, 437.
5. *Sale.*—A party claiming to be the owner of goods by purchase and delivery, is estopped by the levy of an execution in his favor upon the same goods as the property of the defendant in the execution.—*Langsdorf et al. v. Field et als.* 440.
6. *Conveyance—Agreement.*—Parties agreeing upon a division line between their respective lands, are not estopped by such agreement if it be entered into under a mistake of facts, provided the rights of innocent third parties have not intervened in consequence thereof.—*Knowlton v. Smith*, 507.

EVIDENCE.

1. *Stamp.*—Under the act of Congress of March 3, 1863, a note executed before June 1, 1863, is admissible in evidence if the proper stamp be affixed before it is thus offered.—*Day v. Baker et al.*, 125.
2. *Protest—Endorsers.*—To secure the liability of the endorsers of a bill of exchange, or negotiable promissory note, demand of payment must be made of all the makers, and notice of demand and refusal must be given to the endorsers. A notary's protest, which stated "that he presented the same at the office of the makers and was refused payment," without stating from whom payment was demanded, does not show a proper demand and refusal of payment. In a suit against endorsers, such protest may be properly excluded as evidence. A demand of payment may be made by the holder of the note or bill, or any agent for him.—*Nave v. Richardson et als.*, 130.
3. *Presumption—Courts.*—All proper presumptions will be indulged in favor of the judgments of courts of record, and they must appear clearly erroneous before they will be disturbed.—*State v. Rogers et al.*, 138.
4. *Witness—Contradiction.*—Where an attempt is made to impeach a witness by showing that he has made statements differing from his testimony, the witness must have his attention called to the time, place and circumstances of the statements made and the person to whom made, that he may have the opportunity to explain the contradiction. If the attempt be made to impeach his testimony by statements made after the taking of his deposition, a new commission must be taken out, and he must be interrogated as to his contradictory statements before his testimony can be impeached.—*Gregory v. Cheatham*, 155.
5. *Judicial Notice.*—Of the public and official acts of the sovereign political power in the State, or of the executive or judicial departments of the Government, the Circuit Courts are bound to take judicial notice.—*Thomas v. Mead et al.*, 232.

EVIDENCE—(Continued.)

6. *Practice—Objections.*—Objections made to the admission of evidence, without specifying the reasons therefor, will not be noticed in the appellate court. *Han. & St. Jo. R.R. Co. v. Marion County*, 294.
7. *Hearsay.*—The statements made by one who is himself a competent witness are not admissible in evidence. The declarations made by one in possession of property, against his interest, are admissible in evidence against himself and those claiming under him.—*Wood v. Hicks*, 326.
8. *Practice—Fraud.*—A creditor claiming title to land by virtue of a purchase under his judgment and a sale by the sheriff, and seeking to set aside a prior conveyance of the debtor on the ground of fraud, must show that he has acquired the title by a sheriff's deed, if the title be put in issue by the pleadings.—*Hiney v. Thomas et al.*, 377.
9. *Copy.*—Before a copy of an instrument can be admitted in evidence, it must be shown that proper means have been taken to procure the original, and its absence duly accounted for.—*Carr v. Carr et al.*, 408.
10. *Hearsay.*—The statements of one who is a competent witness at the trial are not admissible in evidence. The defendant in an attachment suit is a competent witness upon an interpleader for the property attached.—*Langsdorf et al. v. Field et als.*, 440.
11. *City of St. Louis—Special Tax.*—By the provisions of the act of Jan. 16, 1860 (Sess. Acts 1859-60, p. 382), the special tax bill, certified by the city engineer, is *prima facie* evidence of the liability of the person therein named as the owner of the property.—*City of St. Louis to use, &c., v. Eters*, 456.
12. *Confirmation—Out-boundary Survey.*—The out-boundary survey of a town, including the town with its common-field lots, out-lots, and commons, is no evidence of the location, extent and boundary of the commons, nor of any private lot marked on the plat.—*Robbins et als. v. Eckler et als.*, 494.
13. *Lands and Land Titles—Confirmation.*—Certified copies from the registry of claims proved before the Recorder of land titles under the act of Congress of May 26, 1824, or from the registry of certificates of confirmation or list of claims are proved, or of official survey by the Surveyor General of the lots so proved, or a certificate of confirmation issued by the Recorder of land titles upon such survey, are admissible in evidence as *prima facie* evidence of title to the lot confirmed.—*Clark v. Hammerle*, 620.

EXECUTIONS.

1. *Sheriff's Deed.*—The deed made by the sheriff, upon a sale of land under execution must show that the sheriff acted under a writ that was in force at the time he made the sale. When the sheriff endorsed upon an execution issued June 12, 1854, and returnable the first Monday of August, 1854, a levy made June 16, 1854, and then under the same writ made a sale on the 29th November, 1854; *held*, that no title passed by the deed. The endorsement of a levy upon the writ will not continue the execution in force, so that a sale can be made without a *venditioni exponas*. (R. C. 1855, p. 748, § 54.)—*Lackey v. Lubke*, 115.
2. *Garnishee.*—The defendant in the execution stands to the garnishee in the

EXECUTIONS—(Continued.)

- relation of creditor to debtor; and the plaintiff in the execution, in order to recover, must prove the indebtedness in the same manner as the defendant would be compelled to do had he issued the garnishee.—*Karnes v. Pritchard, Garn.*, 135.
3. *Justices' Courts—Garnishee.*—The garnishee in an execution from a justice of the peace answering, "that he was indebted to the defendant, but could not then state the amount due, as he had a set-off," was allowed time to file an additional answer; held, that allowing time was within the discretion of the justice.—*Id.*
4. *Garnishee.*—The pendency of a suit against the garnishee by the defendant in the attachment or execution will not relieve the garnishee from his liability under the garnishment. After being summoned as garnishee he cannot pay the money due to the attachment or judgment debtor.—*Lieber v. St. Louis Agr. & Mech. Ass'n, Garn.*, 382.
5. *Justices' Courts—Constable.*—A constable sued before a justice for failing to return an execution within the proper time, may, upon a proper case made, be allowed to amend his return so as to show that the execution was returned in time, although suit may have been commenced against himself and his securities.—*Corby, Assignee, &c., v. Burns et al.*, 194.

F

FIXTURES.

1. *Landlord.*—As between vendor and vendee, machinery does not pass with the freehold; and as between landlord and tenant, the tenant may remove any improvement he may make, before he surrenders the premises, provided it can be removed without injury to the freehold.—*Lacey, Trustee, v. Giboney*, 320.

FRAUDS.

1. *Practice—Pleading—Equity.*—A petition which seeks to set aside a patent and to hold the patentee as trustee, upon the ground of fraud, must be as definite and precise as was formerly required on a bill in chancery. It is not sufficient to make a general allegation of fraud without any other specifications of the acts which constituted it.—*Hill v. Miller*, 182.
2. *Practice—Evidence.*—A creditor claiming title to land by virtue of a purchase under his judgment and a sale by the sheriff, and seeking to set aside a prior conveyance of the debtor on the ground of fraud, must show that he has acquired the title by a sheriff's deed, if the title be put in issue by the pleadings.—*Hiney v. Thomas et al.*, 377.
3. *Judgment.*—Judgment set aside as in fraud of creditors.—*Wood v. Hicks*, 326.
4. *Uses and Trusts—Purchasers.*—The trustee holds the legal estate for benefit of the *cestui qui trust*, and no act of his can prejudice the beneficiary; but if the trustee be in actual possession of an estate and sell it to an innocent purchaser for a valuable consideration, without any notice of the trust, the purchaser will be protected.—*Grove v. Heirs of Robards et al.*, 523.

FRAUDS—(Continued.)

5. *Notice—Conveyances.*—The heirs of the grantor in a deed of trust in the nature of a mortgage, who has by fraudulent representation induced the trustee to release the property without the knowledge and consent of the *cestui que trust*, takes the estate with full notice, and stand in the same position as their ancestor.—*Id.*

G

GOVERNOR.

See OFFICERS.

GUARDIAN AND WARD.

1. *Administration—Securities.*—The securities of a curator who has committed a breach of his bond by converting the moneys of his ward to his own use, will be held liable upon their undertaking although the curator may have subsequently given an additional bond, and have made settlements carrying down the balance due his ward so as to make the securities upon the new bond also liable. A judgment against the securities in the second bond for the whole balance due at the last settlement of the curator, will not discharge the securities upon the first bond from their liability for any acts done before the second bond was given. There can be but one satisfaction, but the ward may pursue all his remedies until he has been fully paid. *Quere* as to the liability of the securities upon the different bonds to contribution.—*State to use Drury v. Drury et al.*, 281.
2. *Practice—Infant.*—A petition by an infant must show that the plaintiff is an infant, and sues by a guardian, or next friend legally appointed, or it will be bad on demurrer.—*Higgins, Guard., v. Han. & St. Jo. R.R. Co.*, 418.
3. *Practice—Infant.*—Where an infant sues without procuring the appointment of a "next friend," as required by the statute, the defendant may take advantage of the defect by demurrer or by answer; unless he do so the defect is waived, (R. C. 1855, p. 1231, § 10,) and the defendant cannot move in arrest of judgment. (R. C. 1855, p. 1255, § 19.)—*Jones v. Steele*, 324.
4. *Practice—Amendment.*—After a judgment in favor of an infant plaintiff without the appointment of a "next friend," at the commencement of the suit, the court may upon his application appoint a next friend, and approve his bond, that the money recovered be secured to the infant.—*Id.*

H

HABEAS CORPUS.

1. *Practice—Jurisdiction.*—At the hearing upon a *habeas corpus* the court has authority to adjudge only upon the case of the person alleged to be unlawfully restrained of his liberty, and to remand or discharge the person so restrained; beyond this it has no authority to determine the rights of the parties. Upon a petition for a *habeas corpus*, the Circuit Court has no power or jurisdiction to determine matters of guardianship, the appointment of trustees, the disposition of the property or moneys of the parties, or the making

HABEAS CORPUS—(*Continued.*)

of provision for the support of the children placed in the custody of the mother, or the support of a wife living apart from her husband.—*Ferguson v. Ferguson et al.*, 197.

2. *Practice—Appeal.*—From the decision of a court remanding or discharging a prisoner brought before it upon a writ of *habeas corpus*, no appeal lies.—*Id.*

HIGHWAYS.

1. *Dedication—Estoppel.*—The dedication of land to public uses can be made only by the owner of the fee. The making and recording of a plat of a town, upon which plat certain portions of the land are marked as public, is a grant of such lands to public use, and all persons claiming by subsequent grant through the party thus filing such plat are estopped from denying the title of the public. But a party in possession of such lands, not thus claiming title, is not estopped from denying the title of the party filing the plat.—*City of Hannibal v. Draper's heirs et al.*, 332.

I

INJUNCTION.

1. *Practice—Judgment.*—A defendant in a suit who has been properly served with process, and has failed to appear, cannot enjoin the judgment entered against him, unless he show not only that it is inequitable to execute such judgment against him, but also that he could not have availed himself of his defence at law, or that he was prevented by fraud or accident, without any fault or negligence on his part.—*George v. Tutt et als.*, 141.

J

JUDGMENT.

See PRACTICE, CIVIL.

1. *Irregularity—Appearance.*—*Smith's Adm'r v. Rollins*, 25 Mo. 408, affirmed. A party appearing in court to move to set aside a judgment against him for irregularity, is in court for that purpose only.—*Lincoln v. Hilbus*, 149.
2. *Practice—Irregularity—Limitations.*—The party has three years within which to move to set aside a judgment for irregularity.—*Dysart's Adm'r v. Austin et al.*, 47.
3. *Error.*—A judgment at law is an entirety—good as to all, or bad as to all the defendants. A judgment rendered jointly against the maker and endorser of a promissory note, in a suit in which the maker was not served with process, is erroneous as against the endorser, and will be reversed upon writ of error or appeal.—*Covenant Mut. Life Ins. Co. v. Clover et al.*, 392.
4. *Estoppel.*—*Hempstead v. Hempstead's Administrator*, affirmed. Where no action can be sustained against the administrator, none can be maintained against the securities; and a judgment in favor of the administrator is a bar to a suit, upon the same subject matter, against the securities, as they are in privity with him.—*State to use, &c., v. Coste et al.*, 437.
5. *Fraud.*—Judgment set aside as in fraud of creditors.—*Wood v. Hicks*, 326.
7. *Practice—Evidence—Fraud.*—A creditor claiming title to land by virtue of

JUDGMENT—(Continued.)

a purchase under his judgment and a sale by the sheriff, and seeking to set aside a prior conveyance of the debtor on the ground of fraud, must show that he has acquired the title by a sheriff's deed, if the title be put in issue by the pleadings.—*Hiney v. Thomas et al.*, 377.

JURISDICTION.

See COURTS. EQUITY. PRACTICE.

1. *Courts*.—The Circuit Court has concurrent jurisdiction with justices of the peace in actions on contracts, only in cases where the amount exceeds fifty and is less than ninety dollars. (R. C. 1855, p. 533, § 8.)—*Murphy v. Campbell*, 110.
2. *St. Charles Probate Court—Appeal*.—Under the provisions of the act establishing the St. Charles Probate Court, (Sess. Acts 1859–60, p. 13, § 3,) an appeal lies from that court to the Supreme Court.—*Crow et als. v. Weidner*, 412.
3. *Jurisdiction—Justices' Courts—Law Commissioner*.—Justices of the peace and the Law Commissioner's Court for St. Louis county have no jurisdiction to enforce a lien upon real estate to secure the payment of a special tax for the improvement of streets and alleys, under the charters and ordinances of the City of St. Louis.—*City of St. Louis to use, &c., v. Rudolph*, 465.
4. *Habeas Corpus—Practice*.—At the hearing upon a *habeas corpus*, the court has authority to adjudge only upon the case of the person alleged to be unlawfully restrained of his liberty, and to remand or discharge the person so restrained; beyond this it has no authority to determine the rights of the parties. Upon a petition for a *habeas corpus*, the Circuit Court has no power or jurisdiction to determine matters of guardianship, the appointment of trustees, the disposition of the property or moneys of the parties, or the making of provision for the support of the children placed in the custody of the mother, or the support of a wife living apart from her husband.—*Ferguson v. Ferguson et al.*, 197.
5. *Prohibition—Supreme Court*.—The Supreme Court has jurisdiction and power to issue a writ of prohibition; it is invested by the Constitution with a general superintending control over all inferior courts in the State, and with original jurisdiction to issue writs of *Habeas Corpus*, *Mandamus*, *Quo warrant*, *Certiorari*, and other original remedial writs, and to hear and determine the same. In respect of pre-eminence and power, it holds a position under the Constitution analagous to that of the King's Bench in England, and will keep all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined before it, or prohibit their progress by law. A "Prohibition" is an original remedial writ, and was provided by the Common Law as a remedy for encroachment of jurisdiction. It is directed to the judge and parties to a suit in an inferior jurisdiction, upon the ground that they have illegally assumed or transgressed the limits of their jurisdiction.—*Thomas v. Mead et al.*, 232.
6. *Practice*.—Objections to the jurisdiction of the court are not waived by

JURISDICTION—(*Continued.*)

omitting to take advantage of them by demurrer or answer, and the exception may be taken on the motion for a new trial.—*Lindell's Adm'r v. Han. & St. Jo. R.R. Co.*, 543.

JUSTICES' COURTS.

1. *Jurisdiction*—*Law Commissioner*.—Justices of the peace and the Law Commissioner's Court for St. Louis county have no jurisdiction to enforce a lien upon real estate to secure the payment of a special tax for the improvement of streets and alleys, under the charters and ordinances of the City of St. Louis.—*City of St. Louis to use, &c., v. Rudolph*, 465.
2. *Attachment*—*Garntshee*.—The garnishee in an execution from a justice of the peace answering, "that he was indebted to the defendant, but could not then state the amount due, as he had a set-off," was allowed time to file an additional answer; *held*, that allowing time was within the discretion of the justice.—*Karnes v. Pritchard, Garn.*, 135.
3. *Execution*—*Constable*.—A constable sued before a justice for failing to return an execution within the proper time, may, upon a proper case made, be allowed to amend his return so as to show that the execution was returned in time, although suit may have been commenced against himself and his securities.—*Corby, Assignee, &c., v. Burns et al.*, 194.

L

LANDLORDS AND TENANTS.

1. *Attachment*.—The removal by a tenant of a small portion of his furniture for temporary use elsewhere, the tenant not intending to leave the premises, will not authorize the landlord to sue out an attachment against the tenant under the act of "Landlords and Tenants." (*R. C. 1855*, p. 1015, § 26.)—*Kinear v. Shands*, 379.
2. *Rents*.—Where the military authorities took possession of demised premises, and held possession of the same without the consent of the lessee after the expiration of the term: *Held*, that the lessee was not liable for rent of the premises after the expiration of the term although he had received from the Government the rents accruing during the term.—*Constant v. Abell*, 174.

LANDS AND LAND TITLES.

See CONVEYANCES. EJECTMENT. EQUITY. ESTOPPEL. LIMITATIONS.

1. *Pre-emptions*—*Equity*.—The act of Congress concerning pre-emptions gives the officers of the Land Department the right to determine all questions arising between different settlers. The fee of the lands in this State being originally in the Government, and Congress being vested exclusively with the primary disposal of the soil, the presumption is in favor of the action of the officers designated to execute the laws made for that purpose. Where the officers are vested with discretionary authority, their acts are not subject to the revision of our courts; but when they act without authority of or in violation of law, then jurisdiction will be assumed. A patent carries the legal title, and the presumption is that all necessary preliminary steps have been taken, and in favor of its validity; and the burden of proof is upon him who impeaches it.—*Hill v. Miller*, 182.

LANDS AND LAND TITLES—(Continued.)

2. *Practice—Pleading—Fraud.*—A petition which seeks to set aside a patent and to hold the patentee as trustee, upon the ground of fraud, must be as definite and precise as was formerly required on a bill in chancery. It is not sufficient to make a general allegation of fraud without any other specifications of the acts which constituted it.—*Id.*
3. *Confirmation.*—*Papin v. Hines*, 23 Mo. 274, affirmed.—*Papin et al. v. Ryan*, 406.
4. *Confirmations—Enurement.*—A confirmation by the board of commissioners, under act of Congress of July 4, 1836, to D., or his legal representatives, enures to the benefit of those who show themselves to derive title through D., and not to the persons presenting the claim. (*Hogan v. Page*, 22 Mo. 55, and 32 Mo. 68, affirmed.)—*Connoyer et al. v. Washington University*, 481.
5. *Confirmation—Commons—Survey—Title.*—The act of Congress of June 13, 1812, confirming to the inhabitants of the village of St. Charles their commons, together with an approved official survey by authority of the United States, are equivalent to a patent of the tract of land surveyed as commons; but no such effect can be given to the survey of the commons made by Antoine Soulard, March 2, 1804. The act of Congress did not purport nor intend to confirm claims to commons which existed on March 2, 1804, but only such as existed in fact prior to Dec. 20, 1803. In the absence of any official survey by the United States, the only way in which a title to commons under the act of June 13, 1812, can be shown, is by proof of some grant, concession, survey or actual possession, claim or user of some definite tract of land as commons prior to the 20th Dec., 1803. Without such evidence, there can be no title to commons under that act where no official survey is shown.—*Robbins et als. v. Eckler et als.*, 494.
6. *Confirmation—Out-boundary Survey.*—The out-boundary survey of a town, including the town with its common-field lots, out-lots, and commons, is no evidence of the location, extent and boundary of the commons, nor of any private lot marked on the plat.—*Robbins et als. v. Eckler et als.*, 494.
7. *Confirmation.*—Certified copies from the registry of claims proved before the Recorder of land titles under the act of Congress of May 26, 1824, or from the registry of certificates of confirmation or list of claims are proved, or of official surveys by the Surveyor General of the lots so proved, or a certificate of confirmation issued by the Recorder of land titles upon such survey, are admissible in evidence as *prima facie* evidence of title to the lot confirmed.—*Clark v. Hammerle*, 620.
8. *Confirmation—Survey.*—A lot was claimed and confirmed by the Recorder of land titles, as a lot of one and a half arpens in front "by about thirty arpens in depth," bounded north by Guion, south by Tabeau, east by Aug. Chouteau's mill tract, and west by Charles Gratiot. The lot was officially surveyed in accordance with the calls for boundaries, rejecting the call for quantity of "about thirty arpens in depth." *Held*—That this was the correct mode of surveying the lot proved, and that the certificate of confirmation issued properly conformed to the official survey so made.—*Clark v. Hammerle*, 620.

LANDS AND LAND TITLES—(*Continued.*)

9. *Ejectment—New Madrid Location.*—A defendant claiming title under a New Madrid location is in a position to dispute the correctness and validity of a *prima facie* superior title of the plaintiff under a confirmation by the act of June 13, 1812.—*Clark v. Hammerle*, 620.
10. *Abandonment.*—The Spanish law of abandonment continued in force in this State until A. D. 1816. To constitute an abandonment, there must be a departure of the owner, corporeally, from the land, with the intention that it shall be no longer his. The intention to abandon may be inferred from facts and circumstances. Ceasing to cultivate, mere inaction, removal to another place, is not enough without some act of disclaimer, or act showing an intention to disclaim ownership.—*Id.*

LIENS.

See AGENCY, 6. BAILMENTS, 3, 4. REVENUE, 6, 7, 8.

LIMITATIONS.

1. *Administration.*—If the administrator give notice of the grant of letters, all claims not presented within three years will be barred, unless the creditor can bring himself within the exceptions of the statute. The presentation of the claim in the manner provided by the statute will save the limitation. Proof that the civil law was suspended, on account of the war, during a portion of the period, will not extend the time for presenting the claim.—*Richardson, Adm'r, v. Harrison, Adm'r*, 96.
2. *Practice—Irregularity.*—The party has three years within which to move to set aside a judgment for irregularity.—*Dysart's Adm'r v. Austin et al.*, 47.
3. *Damages.*—Suits for damages under the 2d section of the "Act for the better security of life," &c. (R. C. 1855, p. 647), must be commenced within one year after the cause of action accrues. If the wife of the deceased fail to sue within six months, the minor child has not twelve months thereafter within which to sue.—*Kennedy v. Burrier*, 128.
4. *Judgment—Payment.*—The lapse of a period of time of less than twenty years, with additional circumstances tending to prove payment of a judgment, may induce a presumption of payment, and authorize a jury to find the fact of payment; the presumption being stronger or weaker according to the length of time elapsed.—*Baker v. Stonebraker's Adm'r*s, 338.
5. *Boats and Vessels.*—Suits, under the act R. C. 1855, p. 313, § 42, against boats and vessels upon running accounts for supplies, &c., must be brought within six months after date of the last item in the account.—*Madison County Coal Co., v. St. bt. Colona*, 446.
6. *Adverse Possession—Estoppel.*—The possession required by the statute must be with the intent of asserting an adverse title. Therefore when parties designate their division lines through ignorance or mutual mistake, the possession held by either will not be adverse.—*Knowlton v. Smith*, 507.

M

MANDAMUS.

1. *Office.*—State ex rel. Jackson v. Auditor, &c. (34 Mo. 375), affirmed.—State ex rel. Jackson v. State Auditor, 70.

MECHANICS' LIENS.

1. *St. Louis County*.—The right of an original contractor with the owner of a building, under the special act relating to St. Louis county (Sess. Acts 1843, p. 83,) to file his lien within six months after the completion of the contract—was not taken away by the act R. C. 1855, p. 1071.—*Christman et al. v. Charleville et al.*, 610.
2. *Contract*.—A party seeking to enforce a mechanic's lien upon a building must show that he furnished the materials for the building, under a contract either with the owner of, or the contractor for, the building.—*Hause v. Thompson et als.*, 450.
3. *Credits*.—Where a party filing a mechanic's lien under the statute applicable to St. Louis county, of February 14, 1857, omits to give the credit for payments made, he cannot enforce his lien upon the property of the owner of the building.—*Hoffman et al. v. Walton et al.*, 613.

MORTGAGE.

See ACTION, 5. EQUITY, 12.

1. *Conveyance—Equity—Mistake*.—A conveyance intended as a security for a debt will not be treated as a mortgage in a court of law, unless the land be conveyed to the creditor upon condition. A deed between A. and B. by which A. upon a consideration received from B. conveys to A. (himself) real estate, to be void upon payment of a debt due by A. to B., cannot be foreclosed as a mortgage in a court of law; although, in a court of equity, upon proper allegations of mistake, the deed might be reformed and the equity of redemption foreclosed.—*Rackliffe v. Seal et al.*, 317.
2. *Mortgagor—Substitution*.—A. executed a deed of trust, in the nature of a mortgage, to secure a debt, and subsequently by deed poll conveyed the property to B., reciting in the conveyance that part of the consideration was the payment of the encumbrance by B.; *held*, that B. could not be considered as a mortgagor, and that a personal judgment against B. for the mortgage debt was erroneous. (R. C. 1855, p. 1089, §§ 10, 14.)—*Mason v. Barnard et als.*, 384.
3. *Fraud—Notice—Conveyances*.—The heirs of the grantor in a deed of trust in the nature of a mortgage, who has by fraudulent representations induced the trustee to release the property without the knowledge and consent of the *cestui qui trust*, take the estate with full notice, and stand in the same position as their ancestor.—*Grove v. Robards' heirs et al.*, 523.
4. *Deed of Trust—Title*.—After the maturity of the debt secured by a mortgage or deed of trust of personal property, the mortgagee or trustee has the legal title and the right to recover possession. Although the trustee may have advertised and sold the property, he may sue for the possession, so that he may deliver the property sold to the purchaser.—*Lacey, Trustee, v. Giboney*, 320.
5. *Practice*.—Under the statute of this State, the proceeding for the foreclosure of the equity of redemption of a mortgage, or deed of trust, is a proceeding at law and not in equity.—*Mason v. Barnard et als.*, 384.
6. *Deed of Trust—Instalments*.—Where a deed of trust in the nature of a mortgage, securing several notes maturing at different dates, provided, that, in default of payment of said notes or either of them, or of any one of them,

MORTGAGE—(*Continued.*)

or the interest thereon, as they become due and payable, the trustee might sell, &c.; upon a bill to foreclose the equity of redemption, &c., after all the notes fell due: *Held*, that the notes were to be paid and satisfied in the order in which they matured. The mere failure or neglect to pursue the remedy until all the notes become due cannot impair the rights of the parties where they have done no act which can act injuriously upon the other party.—*Mitchell v. Ladew et als.*, 526.

7. *Deed of Trust—Debt.*—The debt being the principal thing, in a mortgage or deed of trust given to secure it, the transfer of the debt carries with it the security.—*Id.*
8. *Deed of Trust—Notes.*—Where a deed of trust given to secure the payment of several notes falling due at different dates—provided, that if any note should remain unpaid after it fell due, that then all the notes should become due—the notes become due only for the purpose of distributing the fund realized by the sale under the power. Such a provision will not authorize the rendition of a personal judgment against the maker before the notes mature.—*Mason v. Barnard et als.*, 384.

O

OFFICE AND OFFICERS.

1. *Justices' Courts—Execution—Constable.*—A constable sued before a justice for failing to return an execution within the proper time, may, upon a proper case made, be allowed to amend his return so as to show that the execution was returned in time, although suit may have been commenced against himself and his securities.—*Corby, Ass'ee, v. Burns et als.*, 194.
2. *Constable—Bond.*—The constable and his securities upon his official bond are liable for the constable's refusal to pay upon demand the amount collected by him upon notes or accounts given to him for collection without suit. (R. C. 1855, p. 348, § 13, & p. 988, § 121.) The giving of a receipt is not a condition precedent to his liability.—*State to use, v. Grupe et al.*, 365.
3. *Governor—Executive Power—Process.*—The Governor, representing the sovereign executive power in the State, is always virtually present in his courts for the purpose of executing the mandates and process of the courts, whenever the power of the marshal and an ordinary *posse* may not be sufficient for the purpose, or when the peace and dignity of the State may so require.—*Thomas v. Mead et al.*, 232.
4. *Constitution—Election.*—By the Constitution, Art. II., § 8, no vote can be counted for, nor any certificate of election granted to, any candidate who has not taken and filed the oath of loyalty within fifteen days next preceding the election. A certificate of election granted to one who has not thus taken and filed the oath is null and void.—*State ex inf. Att'y Gen. v. McAdoo*, 452.
5. *Constitution—Appointing Power.*—Under the Constitution, the Governor has not the power to fill by appointment a vacancy in the office of sheriff occurring after the Constitution went into effect. Such vacancy must be filled in the manner provided in Art. IV., §§ 23 & 24.—*State ex inf. Attorney Gen. v. McAdoo*, 453.

OFFICE AND OFFICERS—(*Continued.*)

6. *Mandamus*.—State ex rel. Jackson v. Auditor, &c., 34 Mo. 375, affirmed.—
State ex rel. Jackson v. Auditor, 70.

P

PARTNERSHIP.

1. *Administration—Bond*.—The creditor of a partnership under process of administration cannot sue upon the bond of a surviving partner unless he present his demand to the surviving partner to be classified within two years, or have the same allowed against the estate of the deceased partner. Unless the claim be thus presented, the partnership estate will belong to those who do establish their claims, and all others will be cut out from its benefit. (R. C. 1855, p. 125, § 63.)—State to use of Taylor v. Woods et als., 73.
2. *Administration*.—The surviving partner administering upon the effects of the partnership is obliged to account only for such effects and assets as actually come into his hands as surviving partner. Sec. 63, p. 125, R. C. 1855, has no application to the surviving partner, but to the administrator of the deceased partner, in respect to the excess of funds he might receive from the surviving partner upon such settlement.—Crow et als. v. Weidner, 412.
3. *Administration*.—Under the act R. C. 1855, p. 121, &c., the powers of the surviving partner are not changed or restricted, otherwise than that he is required to give security for faithful administration of the assets, and payment of the balance due after paying the partnership debts, &c. He is not required to pay the claims presented *pro rata*, but may pay in full such as he sees fit.—*Id.*
4. *Action—Dormant Partner*.—In case of a dormant partnership, while the credit is given to an ostensible partner because no other is known to the creditor, yet the creditor may also sue the secret partner when discovered, and the credit will not be presumed to have been given on the sole responsibility of the ostensible partner.—Richardson et als. v. Farmer et al., 35.

PAYMENT.

See LIMITATIONS.

POSSESSION.

See LIMITATIONS.

1. *Title*.—An actual possession is evidence of title, against every one who does not show a better title. In the absence of other evidence, a prior lawful possession is proof of a better title.—Summons v. Austin, 307.
2. *Sale*.—Possession of personal property is presumptive evidence of title; but where a sale is made and possession delivered to the purchaser, yet if by express agreement the title is to remain in the seller until the price be paid, the right of property is not vested in the purchaser until payment. And where the vendor has been guilty of no laches, he may reclaim the goods from a third party who took them in good faith and without notice.—Parmlee v. Catherwood et al., 479.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SECURITIES.

PRACTICE, CIVIL.

PARTIES.

1. *Guardian—Infant*.—A petition by an infant must show that the plaintiff is an infant, and sues by a guardian, or next friend legally appointed, or it will be bad on demurrer.—Higgins, *Guard.*, v. *Han. & St. Jo. R.R. Co.*, 418.
2. *Guardian & Ward*.—Where an infant sues without procuring the appointment of a "next friend," as required by the statute, the defendant may take advantage of the defect by demurrer or by answer; unless he do so the defect is waived, (R. C. 1855, p. 1231, § 10,) and the defendant cannot move in arrest of judgment. (R. C. 1855, p. 1255, § 19.)—Jones v. Steele, 324.
3. *Assignee*.—The assignee of the contractor may sue in the name of the City of St. Louis to his use, under the act of March 6, 1855, p. 25, authorizing a special tax to be enforced by proceedings at law.—City of St. Louis to use, &c., v. Rudolph, 465.
4. *Contractor*.—In a suit by the City of St. Louis to the use of the contractor, to recover the amount of a special tax levied for the improvement of a street under act of 1855, p. 25, the city is the substantial plaintiff, and a defence which would be good against the city will be available against its assignee.—City of St. Louis to use McGrath et al. v. Clemens, 467.
5. *Error—Irregularity*.—Where the plaintiff in the suit dies, the administrator can be substituted in his place only by the voluntary appearance of the defendant, or by the service upon him of a *scire facias*. To enter the appearance of the administrator and give judgment against defendant without such appearance or *scire facias*, is erroneous.—Harkness, *Adm'r*, v. Austin et al., 47.
6. *Sheriff*.—In an action, for the delivery of personal property, against the sheriff, it is proper to allow the parties interested with the sheriff to be made co-defendants, that they may defend the action and protect their interests.—Vallé et al. v. Cerré's *Adm'r*, 575.

PLEADINGS.

7. *Issue—Note*.—Where the answer denies any of the material allegations of the petition, and presents an issue of fact, it cannot be stricken out upon motion. An answer denying the endorsement or assignment of the note to the plaintiff, or alleging that the note was obtained by fraud, and that the plaintiff had notice thereof at the time of taking the note, or alleging that the note had been fraudulently altered after delivery, tenders material issues.—Mechanics' Bank v. Fowler et al., 33.
8. *Pleading—Equity—Fraud*.—A petition which seeks to set aside a patent and to hold the patentee as trustee, upon the ground of fraud, must be as definite and precise as was formerly required on a bill in chancery. It is not sufficient to make a general allegation of fraud without any other specifications of the acts which constituted it.—Hill v. Miller, 182.

See HABEAS CORPUS, 1.

PRACTICE, CIVIL—(Continued.)

9. *Joinder of Causes of Action*.—Several causes of action for injuries to person or property, whether real or personal, direct or consequential, and whether the damages are given by statute or by common law, single or double, may be included in the same petition.—Clark's Adm'r v. Han. & St. Jo. R.R. Co., 202.
10. *Misjoinder of Causes of Action*.—Where several causes of action are joined in one count of a petition, the count will be bad on demurrer, or on motion in arrest of judgment.—*Id.*
11. *Joinder of Actions*.—A cause of action founded upon a contract cannot be united in the same count with a cause of action founded upon an injury to property.—Ederlin v. Judge, 350.
12. *Infant*.—A petition by an infant must show that the plaintiff is an infant, and sues by a guardian, or next friend legally appointed, or it will be bad on demurrer.—Higgins v. Han. & St. Jo. R.R. Co., 418.
13. *Contract not to sue—Answer*.—A covenant or agreement not to sue upon a claim, cannot be pleaded in bar of the prosecution of an action upon such claim. The remedy of the party is by an action upon the covenant or agreement. An answer setting up an agreement not to sue, presents no defence to an action.—Bridge et als. v. Tierman, 439.
14. *Answer—Counter-claim*.—Where the answer sets up new matter by way of counter-claim, to which no demurrer or reply is filed, the defendant is entitled to have a judgment by default entered upon the counter-claim.—City of St. Louis to use McGrath et al. v. Clemens, 467.
15. *Jurisdiction*.—Objections to the jurisdiction of the court are not waived by omitting to take advantage of them by demurrer or answer, and the exception may be taken on the motion for a new trial.—Lindell's Adm'r v. Han. & St. Jo. R.R. Co., 543.

TRIALS.

See DEPOSITIONS, 1, 2, 3. EVIDENCE.

16. *Variance*.—A bill was made payable at "the Bk. of Mo. at St. Louis"; the petition alleged presentment of the bill "at the Bank of the State of Missouri at St. Louis, Mo., the place designated in said bill for payment" Held, no variance.—Bk. of the State of Mo. v. Vaughan et al., 90.
17. *Dismissal*.—After the cause was submitted to the jury and they had retired to consider their verdict, the plaintiff suggested the death of one of the defendants and dismissed the case as to him; held, that § 48, p. 1269, R. C. 1855, did not apply to the case, and that such dismissal was properly entered.—Huthsing v. Maus, 101.
18. *Mortgage—Deed of Trust—Title*.—After the maturity of the debt secured by a mortgage or deed of trust of personal property, the mortgagee or trustee has the legal title and the right to recover possession. Although the trustee may have advertised and sold the property, he may sue for the possession, so that he may deliver the property sold to the purchaser.—Lacey, Trustee, v. Giboney, 320.
19. *Negligence*.—The question of negligence is one of fact to be submitted to the jury.—Kennedy v. North Mo. R.R. Co., 351.

PRACTICE, CIVIL—(Continued.)

20. *Instructions*.—In chancery cases, it is not necessary to present the questions of law arising on the case by instructions —Hunter v. Miller et al., 143.
21. *Instructions*.—Courts should not state propositions of law hypothetically to a jury, where there is no evidence in the case applicable to them.—Kennedy v. North Mo. R.R. Co., 351.
22. —*Instructions*.—Where the plaintiff has closed his evidence, and it has no tendency whatever to prove the issue necessary to a recovery, the court may determine the whole case as a matter of law.—Boland and wife v. Missouri R.R. Co., 484.
23. *Instructions*.—If the instructions given correctly state the law of the case, the judgment will not be reversed because other instructions asserting the same propositions of law are refused.—State to use, &c., v. Wissmark et al., 592.
24. *Instructions*.—An instruction which refers a matter of law to the jury is erroneous.—Vallé et al. v. Cerré's Adm'r, 575.
25. *Instructions*.—At the close of the plaintiff's evidence, the defendant has a right to ask of the court instructions upon the case as made by the plaintiff, and to have the case submitted to the jury.—Clark's Adm'x v. Han. & St. Jo. R.R. Co., 202.
26. *Verdict*.—Where a verdict is found for an entire amount of damages upon a petition containing several counts, if any of the counts be defective the judgment will be arrested.—*Id.*
27. *Practice—Amendment*.—After a judgment in favor of an infant plaintiff without the appointment of a "next friend," at the commencement of the suit, the court may upon his application appoint a next friend, and approve his bond, that the money recovered be secured to the infant.—Jones v. Steele, 324.
28. *New Evidence*.—The re-opening of a case, to allow a plaintiff to offer further evidence, after he has declared his evidence closed, is a matter within the discretion of the court, and will not be reviewed except where the discretion has been unfairly exercised.—Harvey et al. v. Brooke, 493.
29. *Jeofails*.—Although a petition be defective, yet if it appear after verdict that the verdict could not have been given or the judgment rendered without proof of the matter omitted to be stated, the defect will be cured by the statute, and the judgment will not be arrested.—Richardson et als. v. Farmer et al., 35.
30. *New Trials—Newly discovered Evidence*.—In a motion for new trial for the reason of newly discovered evidence, the party must show, that by the exercise of due diligence he could not have procured the evidence he failed to produce.—*Id.*
31. *New Trial*.—If the party against whom a verdict is found and judgment given fail to file his motion for a new trial within the four days prescribed by the statute (R. C. 1855, p. 1286, § 6), but subsequently files his motion, which is overruled, no writ of error will lie from the judgment overruling the motion.—Richmond's Adm'x v. Pogue, 313.

PRACTICE, CIVIL—(*Continued.*)

32. *New Trial*.—The Supreme Court will not disturb a verdict on the ground merely that it is against the weight of evidence, unless it can be seen that the preponderance is so great as to imply some gross partiality, or some prejudice or misconduct on the part of the jury.—*Baker v. Stonebraker's Adm'rs*, 338.
33. *Judgment—Irregularity—Appearance*.—*Smith's Adm'r v. Rollins*, 25 Mo. 408, affirmed. A party appearing in court to move to set aside a judgment against him for irregularity, is in court for that purpose only.—*Lincoln v. Hilbus*.—149.
34. *Judgment*.—A judgment at law is an entirety—good as to all, or bad as to all the defendants. A judgment rendered jointly against the maker and endorser of a promissory note, in a suit in which the maker was not served with process, is erroneous as against the endorser, and will be reversed upon writ of error or appeal.—*Covenant Mut. Life Insur. Co. v. Clover et al.*, 392.
35. *Irregularity—Limitations*.—The party has three years within which to move to set aside a judgment for irregularity.—*Dysart's Adm'r v. Austin et al.*, 47.
36. *New Trial—Excessive Damages*.—The Supreme Court will not grant a new trial upon the ground of excessive damages, unless it appears at first blush that the damages are flagrantly excessive, or that the jury have been influenced by passion, prejudice or partiality.—*Kennedy v. North Mo. R.R. Co.*, 351.
37. *Judgment—Error*.—A judgment rendered against a defendant upon a debt not due is erroneous, and the error may be taken advantage of even after a judgment by default.—*Mason v. Barnard et als.*, 384.
38. *Demand*.—To avail himself of the want of a demand made previous to a suit, the defendant must set up the defence in his answer and tender the amount due. (R. C. 1855, p. 448, § 34.)—*State to use, &c., v. Grupe et al.*, 366.

SUPREME COURT.

See JURISDICTION. COURTS.

39. *Error*.—A judgment at law is an entirety—good as to all, or bad as to all the defendants. A judgment rendered jointly against the maker and endorser of a promissory note, in a suit in which the maker was not served with process, is erroneous as against the endorser, and will be reversed upon writ of error or appeal.—*Covenant Mut. Life Ins. Co. v. Clover et al.*, 392.
40. *Error—Motion for New Trial—Criminal Practice*.—Such errors as appear upon the face of the record, or such as may be taken advantage of by a motion in arrest or by a writ of error, will, in criminal cases, be noticed in the Supreme Court as a matter of course; but as to exceptions taken in the progress of the trial, and as to motions for a new trial and in arrest which become part of the record only by bill of exceptions, the same rule governs in criminal as in civil cases.—*State v. Marshall*, 400.
41. *Error—New Trial*.—No exception can be taken in the Supreme Court upon appeal or writ of error, to matters not appearing upon the face of the

PRACTICE, CIVIL—(*Continued.*)

record, unless they are made part of the record by bill of exceptions and have been expressly decided by the court below, which must appear by the filing and overruling a motion for a new trial, and exceptions thereto preserved. It is not required by the statute (R. C. 1855, p. 1286, § 6) that the motion for a new trial should specify the reasons for which it is made, but that is the better practice. By the Practice Act of 1849 it was not necessary that the exceptions should be saved by a motion for a new trial. (*Fine v. Rogers*, 15 Mo. 315; *Wagner v. Jacoby*, 26 Mo. 530; *Prince v. Cole*, 28 Mo. 486; *Gray v. Heslep*, 33 Mo. 243, commented upon.)—*Id.*

42. *Error*.—Where the judgment is manifestly for the right party, the judgment will not be reversed for errors not affecting the merits of the case.—*Hunter v. Miller et al.*, 143.
43. *Error*.—Where no exceptions are saved in the inferior court, the Supreme Court will only notice errors apparent on the face of the record.—*Mason v. Barnard et als.*, 384.
44. *Appeal*.—Dismissed for failing to prosecute.—*State v. Phillips et al.*, 149.
45. *Appeal*.—Dismissed for want of assignment of errors.—*State v. Smith*, 149.
46. *Habeas Corpus—Appeal*.—From the decision of a court remanding or discharging a prisoner brought before it upon a writ of *habeas corpus*, no appeal lies.—*Ferguson v. Ferguson et al.*, 197.

PRACTICE, CRIMINAL.

See ERROR, 5, 6.

1. *Recognizance*.—Where a recognizance is taken by a judge who has authority to take such recognizance for the appearance of the party before the Circuit Court, it will be presumed that the necessary preliminaries were complied with, and that the proceedings were regular and proper.—*State v. Rogers et al.*, 138.
2. *Robbery—Larceny*.—A party indicted for the crime of robbery in the first degree (R. C. 1855, p. 574, § 20) cannot be convicted of robbery in the second degree (R. C. 1855, p. 594, § 21), but may be convicted of larceny. It is of the essence of robbery in the first degree, that the violence or fear of injury should be present and immediate to the person, and that the property should be actually taken from the owner's person, or in his presence, and against his will.—*State v. Jenkins*, 372.
3. *Slavery—Larceny*.—The possession of the slave is the possession of the master. An indictment, therefore, charging the defendant with purchasing from a slave, property belonging to the master, is bad on motion in arrest.—*State v. Edwards*, 394.
4. *Trial—Verdict*.—In cases of felony, the accused must be personally present at the trial, and no verdict can be entered against him except in his presence.—*State v. Braunschweig*, 397.
5. *Appearance*.—If the accused appear and plead to the indictment, no more formal arraignment is necessary.—*Id.*
6. *Jurors—Exceptions*.—Objections to the panel, or to jurors, must be preserved by exceptions.—*State v. Marshall*, 400.



PRACTICE, CRIMINAL.—(Continued.)

7. *Venire*.—It is not necessary that the order of the court directing the sheriff to summon jurors, should be under the seal of the court.—*Id.*
8. *Witness—Evidence*.—A witness may decline answering questions which tend to criminate himself.—*Id.*
9. *Statement—Evidence*.—The statement made by the prisoner before the committing magistrate is not admissible in evidence either for or against the prisoner.—*Id.*
10. *Variance*.—An indictment charging the defendant with selling intoxicating liquors to A., is not sustained by proof of selling to other persons. The allegations and the proofs must correspond in criminal as well as in civil cases.—*State v. Hays*, 80.

PROHIBITION.

See JURISDICTION, 5.

R

REVENUE.

1. *Union Military Bonds*.—By the act of February 10, 1865, (Sess. Acts 1865, p. 56, § 31,) and the ordinance of the Convention of April 8, 1865, § 23, an appropriation was made for the payment of Union Military bonds and of the Missouri Militia, in the first class. By the act of February 15, 1865, (Sess. Acts 1865, p. 61,) the bonds were properly presented to the Auditor, to compute the principal and interest due, and draw his warrant upon the Treasurer for the payment of the bonds presented for redemption.—*State ex rel. Werkman v. Treasurer*, 49.
2. *Union Military Fund*.—The act of the General Assembly (Sess. Acts 1863, p. 27, § 9) appropriates all the moneys collected under the act to the payment and redemption of the bonds issued under the act. The expenses of assessing and collecting the tax are not to be paid out of the moneys collected for this fund.—*State ex rel. Long v. Treasurer*, 58.
3. *Secretary—Militia*.—By the act of February 28, 1865, (Sess. Acts 1865, p. 59), the Secretary of State was to be paid for his services under the act, out of any moneys in the Treasury not otherwise appropriated, and not out of the fund created by the act.—*State ex rel. Secretary of State v. State Auditor*, 65.

See ATTORNEY GENERAL.

4. *Stamp—Evidence*.—Under the act of Congress of March 3, 1863, a note executed before June 1, 1863, is admissible in evidence if the proper stamp be affixed before it is thus offered.—*Day v. Baker et al.*, 125.
5. *City of St. Louis—Sewers—Special Tax*.—Under the provision of act of March 14, 1859, (Sess. Acts 1858-9, p. 168,) the City of St. Louis has authority to direct district sewers to be made whenever the city council shall consider such sewers necessary, without a petition from a majority of the property owners or the recommendation of the board of health.—*City of St. Louis to use, &c., v. Eters*, 456.
6. *City of St. Louis—Special Tax—Evidence*.—By the provisions of the act of Jan. 16, 1860 (Sess. Acts 1859-60, p. 382), the special tax bill, certified by

REVENUE—(Continued.)

the city engineer, is *prima facie* evidence of the liability of the person therein named as the owner of the property.—City of St. Louis to use, &c., v. Eters, 456.

7. *City of St. Louis—Special Tax—Lien.*—The right to charge the real estate fronting upon a street improved under the act March 6, 1855, (Adj. Sess. Acts 1855, p. 25, § 6) with a lien for the amount of work done, does not depend upon the completion of the contract for the whole of the work ordered, but only upon the completion of the work in front of the property to be charged.—City of St. Louis to use McGrath et al. v. Clemens, 467.
8. *Practice—City of St. Louis—Special Tax—Judgment.*—The suit against a party to recover the amount of a special tax levied under the act of March 5, 1855, p. 25, § 6, is a suit *in personam*, and authorizes a general judgment for the amount of the tax and interest as well as a special judgment against the property.—*Id.*
9. *Practice—Parties.*—In a suit by the City of St. Louis to the use of the contractor, to recover the amount of a special tax levied for the improvement of a street under act of 1855, p. 25, the city is the substantial plaintiff, and a defence which would be good against the city will be available against its assignee.—*Id.*
10. *Practice—Parties.*—The assignee of the contractor may sue in the name of the City of St. Louis to his use, under the act of March 6, 1855, p. 25, authorizing a special tax to be enforced by proceedings at law.—City of St. Louis to use, &c., v. Rudolph, 465.
11. *Constitution—Special Tax.*—Cases of Egyptian Levee Co. v. Hardin (27 Mo. 495), and City of St. Joseph v. Anthony (30 Mo. 539), affirmed.—City of St. Louis, to use McGrath et al. v. Clemens, 467.

S

SALES.

See CONTRACTS, 1, 2, 3.

STAMPS.

See BILLS AND NOTES, 4.

SECRETARY OF STATE.

See REVENUE, 3.

SECURITIES.

See ADMINISTRATION, 4, 7. EQUITY, 2, 7, 9, 12.

SLAVES.

1. *Larceny.*—The possession of the slave is the possession of the master. An indictment, therefore, charging the defendant with purchasing from a slave property belonging to the master, is bad on motion in arrest.—State v. Edwards, 394.

T

TRESPASSES.

See CORPORATIONS, RAILROAD, 2, 3, 4. DAMAGES, 6.

TRESPASSES—(Continued.)

1. *Action*.—The "Act concerning trespasses" (R. C. 1855, p. 1532) contemplates voluntary or wilful trespasses only, which are done without lawful right.—*Lindell's Adm'r v. Han. & St. Jo. R.R. Co.*, 543.

U

USES AND TRUSTS.

See MORTGAGES.

1. *Conveyances — Trustees*.—In consideration of the payment of the sum of \$500, M. conveyed land to nine persons as trustees of the Methodist Episcopal Church South, and to them and their successors in office lawfully appointed forever; one of the grantees died, and another removed from the State; *held*, that the Circuit Court had no authority to fill the vacancies and appoint new trustees under the act. (R. C. 1855, p. 1554, § 1.) *Held, further*, that if the consideration was paid by the persons constituting the church, that a court of equity would, upon the application of the church, fill the vacancies existing by appointing as trustees such persons as the church might select; but if the money was paid by the grantees, that then the legal title would belong to them and no appointment was needed.—*Draper et al. v. Minor et al.*, 290.
2. *Vendors and Purchasers — Estoppel*.—An outstanding title purchased by a vendee of land in possession under a title bond, enures to the benefit of the vendor. In a suit upon the notes given for the consideration, the vendee cannot defeat a recovery upon the ground of failure of title, but will be allowed the cost and expenses of his purchase of such outstanding title.—*Ash, Adm'r, v. Holder*, 163.
3. *Equity — Purchasers*.—The trustee holds the legal estate for benefit of the *cestui qui trust*, and no act of his can prejudice the beneficiary; but if the trustee be in actual possession of an estate and sell it to an innocent purchaser, for a valuable consideration, without any notice of the trust, the purchaser will be protected.—*Grove v. Heirs of Robards et al.*, 523.
4. *Notice — Conveyances*.—The heirs of the grantor in a deed of trust in the nature of a mortgage, who has by fraudulent representation induced the trustee to release the property without the knowledge and consent of the *cestui qui trust*, takes the estate with full notice, and stand in the same position as their ancestor.—*Id.*
5. *Action — Power*.—A. sued the trustee in a deed of trust, and the holder of the notes thereby secured, alleging in his petition that by the power notice of the sale was to be given by advertisement inserted in newspapers printed in St. Louis and Franklin counties, and that notice was only published in Franklin county; and alleging also, that, by the wrongful, oppressive and fraudulent conduct of the holder of the notes, in combination with the trustee, bidders were deterred from bidding, the property was sacrificed, and brought less than parties were ready and willing to bid for it: *Held*, that as by the petition it appeared that the sale was void both in law and equity, no action at law for damages could be sustained.—*Thornburg v. Jones et al.*, 514.

V

VENDORS AND PURCHASERS.

See EQUITY, 2, 7, 8, 9, 12. SALES. CONTRACTS.

VENUE.

1. *Practice*.—In civil suits, the affidavit in support of a motion for change of venue must be sworn to by the party himself. (Levin v. Dille, 17 Mo. 64, affirmed.)—Huthsing v. Maus, 101.

W

WITNESSES.

See EVIDENCE.

WRITS.

See JURISDICTION, 4, 5.